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Richard H. Underwood

University of Kentucky College of Law, runderwo@uky.edu

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PERJURY: AN ANTHOLOGY

Richard H. Underwood*

I. CINCINNATUS' REVENGE

Hodie mihi, Cras tibi.

The Roman was an extrovert, and saw himself as others saw him. His self-esteem and well-being, indeed in many cases his very survival, turned on how well he bore up under the gaze of others¹ and maintained his honor (not to be confused with morality in the modern sense of the word). This scrutiny took a legal form in the early census, conducted by elected censors, which ranked citizens. The censors had the power to "move a citizen a few rungs down the social ladder" for misconduct. Perjury was just the sort of offense that the censors were likely to take note of.² This may explain why we find more references in Roman history to instances in which perjury was punished by public shame or exile rather than by execution at the Tarpeian Rock, a cliff on the Capitoline Hill.³ "Like many ancient societies, including Greek and Celtic ones, Rome was a society of blame and praise. Collective approbation and reproof regulated everything that law and institutions overlooked—in other words, the whole of

*© Richard H. Underwood 1995. Spears-Gilbert Professor of Law, College of Law, University of Kentucky; B.S., J.D., The Ohio State University. This anthology will appear as Chapters 10 and 11 in a forthcoming book FALSE WITNESS: THE LAW AND LORE OF PERJURY AND OTHER FORENSIC MISCHIEF. Plate 1 is from a mural in the old Justice Department building. It shows Justice going down to defeat, sucker-punched by two-faced Perjury, with the suborner, Bribery, forking over the inducement. Plate 1 is from The United States Department of Justice. I would like to thank the following persons and organizations for permission to reproduce the materials shown as Plates 1-2:

1. The United States Department of Justice
2. Time Life Syndication
1. The subtitle of a section in FLORENCE DUPONT, DAILY LIFE IN ANCIENT ROME (1992).
2. *Id.* at 7. Cf. Witten v. Sternberg, 475 S.W.2d 496 (Ky. 1971) (alluding to the fact that in 1758 the North Carolina Assembly excluded one Francis Brown for perjury). "He was reelected twice in 1760 and excluded on both occasions." *Id.* at 500. Perhaps we should revive exclusion for falsehood at the national level, as a way of imposing "term limits."
3. The Twelve Tables, and ancient law code, contained the entry "*Qui falsum testimonium dixisse convictus esset, e saxo Tarpeio deiceretur.*" (Whoever is convicted of perjury shall be flung from the Tarpeian Rock.). 1 JAMES STACHEN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 41-42 (1969).

moral life."⁴ At the same time, Roman life seems also to have been organized in a manner not unlike that illustrated in modern movies about Mafia Dons and their families. Each citizen was at once both a patron to his followers and, in turn, a client of some more powerful patron. Political contests resembled gang warfare, or worse—something like warfare between bands of British soccer fans, if one can imagine anything quite so horrific.⁵ Loyalty and revenge were valued and expected. The vendetta was the order of the day, and "[t]he field of combat was [often] the law court [where] words were the weapons used."⁶ While perjury was condemned, testimony was given and withheld for partisan reasons, to achieve political ends. The story of Lucius Quinctius, a.k.a. Cincinnatus, illustrates all of this, as it is set down in Book III of Livy's history of Rome.⁷

In some of its particulars, the story may be familiar to the reader. Politics exhibit a depressing sameness through the ages. Furthermore, Cincinnatus was a popular figure in Revolutionary America,⁸ and his romantic image made it into modern schoolbooks (in the 1950s and 1960s at least). He was an aristocrat living in genteel poverty, who put aside his plow and put on the mantle of General (more properly that of Dictator) in order to defeat the enemies of the Republic; but who then voluntarily relinquished his power, put off his splendid cloak, and returned to private life after the crisis had passed. George Washington was viewed as a Cincinnatus figure, and the theme is apparent to those few moderns who are willing to make a cursory examination of our public art.⁹ But Livy also tells a tale of the depredations of a false witness, and of the liar's comeuppance. This is what is important for present purposes.

We return to the early days before Rome was undisputed master. The depredations of hostile tribes and the outbreak of disease sorely pressed the City. But Rome survived and emerged in a position to maintain an offensive. After some initial scares, Rome soundly defeated the enemy tribes. But while the patrician consuls had been out chasing the enemy, a tribune by the name of Terentilius had remained home whipping up discontent among the plebs. His plan was that a law should be drawn up (the *Terentilian Law*) for the purpose of

4. DUPONT, *supra* note 1, at 11.

5. For an interesting portrait of the times, see STEVEN SAYLOR, *CATALINA'S RIDDLE* (1993). Will Durant observes that "[c]ontentment is as rare among men as it is natural among animals . . . [and that the class war that broke out as early as 494 B.C.] ended only with the Republic that it destroyed." WILL DURANT, *CEASAR AND CHRIST* 22-23 (1971).

6. DUPONT, *supra* note 1, at 15.

7. B.O. FOSTER, III *LIVY* 37-99 (1922); DUPONT, *supra* note 1, at 41-44.

8. See HENDRIK WILLEM VAN LOON, *THE ARTS* 533 (1939); ALLAN ECKERT, *THE FRONTIERSMAN* 334-35 (1970) (recounting how Cincinnati, Ohio, (formerly Losantiville) was renamed by General St. Clair, who was a member of the Society of Cincinnati); see also DOUGLAS FREEMAN, *WASHINGTON* (1968); CARL RICHARD, *THE FOUNDERS AND THE CLASSICS* (1994).

9. Jean-Antoine Houdon's statue of George Washington in the Virginia Capitol is the best example. See LARRY SILVER, *ART IN HISTORY* 299-300 (1993).

stripping the consuls of the power to make laws "of their own whims and caprices."¹⁰ This provoked the most bitter of denunciations from the Senate. The patrician elements pretty much accused Terentilius of plotting treason while the consuls were gone from the City. The return of the triumphant army spelled temporary defeat for Terentilius, but he persisted. The next year he proposed the same law and the political battle lines were drawn up. At this point the patrician elements tried to identify some new external threat to divert attention (sound familiar?) and justify the consular powers, and the Senate called for a levy. The tribunes contended that these threats were phoney, and labeled the levy an act of war against the plebs. Riots broke out.

In the course of the more or less organized head-busting that followed, one young noble stood out for his boldness and skill in rabble-bashing—Cincinnatus' son Caeso Quinctius. Alas, his pugilistic performances made him the principal target of the tribunes, and he was forced to stand trial on charges made by one Aulus Verginius. In this way, Caeso was set up as a symbol of patrician resistance to a law that was identified with liberty for the people. His fate and the fate of the law were linked; and Caeso was getting less popular every day. Caeso probably didn't stand much of a chance at his so-called trial, but his enemies decided to take no chances and got a former tribune named Marcus Volscius Fictor to press a specific charge that Caeso had killed Volscius' brother in a brawl. There was a suggestion that the fight had not been fair, in that the victim had been sick and was still in a weakened condition when Caeso downed him. Caeso had to put up an enormous bail (apparently, a new concept thought up by the tribunes, especially for this occasion). Caeso split, and took up residence with the Etruscans, leaving Cincinnatus holding the bag. The bail was forfeited; Cincinnatus was, as a consequence, impoverished, and moved into a hovel on a small farm plot on the other side of the Tiber. The plebs and patricians returned to their fight over the proposed law.

Meanwhile Rome's enemies had not been asleep. The previously cowed tribal enemies were once again up to their perennial plundering, raping, and such. Worse than that, certain exiles tried to incite a slave revolt. At least, they seized the Capitol and the Citadel. The patricians were afraid to arm the plebs indiscriminately, and all might have been lost had the slaves actually risen in numbers. That most feared turn of events did not come to pass, but it appeared that the rebel leader might, in desperation, cut a deal with the enemy tribes, and bring them into the city. Just in the nick of time, Rome's Tusculan allies arrived to save the day. The Capitol was retaken.

Nevertheless, faction still racked Rome. The City had lost a consul in the assault on the Capitol, and it was critical that it find a strong replacement. It was at this point that the patricians remembered Cincinnatus, and prevailed upon him to come out of his voluntary exile and take the job. Cincinnatus managed to

10. See FOSTER, *supra* note 7, at 30-31. Actually, the thought was that all law should be "codified" and knowable—an outbreak of justice and what we today call fair notice and due process. *Id.*

discredit the tribunes, accusing them of disarming the people and leaving them at the mercy of the tribes and exiles. The people were now in arms and, more or less, under consular authority as a result of the recent emergency, and order was restored. His job done, Cincinnatus retired from the fray.

There followed yet another military adventure against the tribes, which the enemy countered by seizing the Tusculan capitol, followed by a Roman counterattack to free it. According to Livy, the tribunes seized the chance to get their agenda through while the army was out of town. But while they were plotting, the patricians countered with a credible charge, supported by newly discovered evidence, that Marcus Volscius (Caeso's accuser) had been guilty of perjury. Witnesses came forward to swear that Caeso had been out of town at the time of the fateful affray. More spectacular still was new evidence that Caeso's victim had never recovered from the illness that had allegedly weakened him prior to the attack, and that he had, in fact, never gotten out of his sick-bed! Caeso had been driven from Rome for a crime that had never occurred, a victim of politics, pure and simple. This put off the tribunes long enough for the army to return. This sort of see-saw activity continued for some time. Ultimately, hard-pressed within by faction and without by the Sabines and the Aequi, Rome had to call Cincinnatus out of retirement one more time and anoint him Dictator. This time Cincinnatus not only subdued Rome's external enemies, but also attended to the prosecution of Marcus Volscius, the false witness.¹¹ One assumes that Volscius stood no more chance than Caeso had, but the all-powerful Cincinnatus did not have to resort to false testimony to get the result he wanted. Volscius was condemned and exiled, and Cincinnatus went back to his farm.

Hodie mihi, Cras tibi has been cited as the essence of the *Graeci fide* and translated as "swear thou for me today, I'll swear for thee tomorrow."¹² But a literal translation would be more like "Today to me, tomorrow to you," or, "My turn today, yours tomorrow,"¹³—in today's argot "What goes around comes around," or "What goes out comes back." There's nothing like just deserts, after all.

II. THE SAINT AND THE SOLICITOR

If I were a man, my lords, that had no regard to my oath, I had had no occasion to be here at this time, as is well known to every body, as a criminal; and if this oath, Mr. Rich, which you have taken, be true, then

11. FOSTER, *supra* note 7, at 85 (intimating that Caeso was probably dead by this time, and that he may have died with the exiles during their abortive slave revolt).

12. *II Bishop Sanderson's Sermons*, in JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY 312 (3d Am. ed. 1873).

13. EUGENE ERlich, AMO, AMOS, AMAT AND MORE 144 (1987).

*I pray I may never see God's face, which, were it otherwise, is an imprecation I would not be guilty of to gain the whole world.*¹⁴

Sir Thomas More was famous and respected in his own day, and after his death was canonized at least twice—once by the Church and a number of times by Hollywood, the ultimate arbiter of our values. Churchill went so far as to say that

More stood forth as the defender of all that was finest in the medieval outlook. He represents to history its universality, its belief in spiritual values, and its instinctive sense of other-worldliness. Henry VIII with cruel axe decapitated not only a wise and gifted counsellor, but a system which, though it had failed to live up to its ideals in practice, had for long furnished mankind with its brightest dreams.¹⁵

Without disagreeing, I will digress for a moment. Thomas More may have been the bright and particular star of the Middle Ages. But Henry VIII found it necessary to put out a great many others as he and Thomas Cromwell strove to create the Tudor State. Only a few are remembered at all, and I suspect that not a few displayed the same courage as Thomas More.

For example, lawyer and *litteratus* Reginald Hine tells of his search for the original document of surrender of the Carmelite Priory at Hitchin, dated 1539, which he found hidden in the secret drawer of an antique chest. The King seized this religious house, one of many, having decided that "it [was] neyther used to the honor of God or the benefite of [the] common wealth." The surrender bears the signatures of the Prior and four others, among them one Brother Alexander, who "must have suddenly repented of the deed, for he [drew] the quill firmly and erasingly through [his name]." Hine speculates that Alexander paid a terrible price for this display of regret and defiance.¹⁶

Chancellor More, at least, was given a chance to plead before the law, and may even have thought that he had a chance to win his case and save his head. Henry had enough respect for More's fame and influence on the international scene to know that there had to be at least an appearance of legal regularity to the proceedings; and there was also enough doubt about the outcome of a fair trial that the King and his creatures thought it necessary to employ a false witness. In More's case, the false witness was none other than the King's Solicitor General Rich, who, for an "officer-of-the-court," had a very bad reputation insofar as truth

14. 1 T.B. HOWELL, STATE TRIALS, 390 (1816).

15. WINSTON CHURCHILL, II A HISTORY OF THE ENGLISH SPEAKING PEOPLES, THE NEW WORLD 65 (1990) [*hereinafter* CHURCHILL, VOL II].

16. REGINALD HINE, CONFESSIONS OF AN UNCOMMON ATTORNEY 118-19 (1950).

and veracity were concerned.¹⁷ During the trial More challenged Rich's credibility with the following points, *which went unanswered*:

[More] . . . '[N]either myself, nor any body else to my knowledge, ever took you to be a man of such reputation, that I or any other man would have any thing to do with you in a matter of importance . . . you always lay under the odium of a very lying tongue, of a great gamester, and of no good name and character either there [in the parish] or in the Temple [Inns of Court], where you were educated. Can it therefore seem likely to your lordships, that I should in so weighty an affair as this, act so unadvisedly, as to trust Mr. Rich, a man I had always so mean an opinion of, in reference to his truth and honesty'

It was the King's failure to defeat More by other means that forced him to such extremes. More was much too intelligent to openly express his opposition to the King's divorce of Catherine and remarriage to Anne Boleyn (Nan Bullen), although he silently resigned as Lord Chancellor and did not attend the new Queen's coronation. Nevertheless, retaliation was inevitable. More had already fought off efforts to discredit him with allegations that he accepted judicial bribes, and successfully defended against a charge that he had and did not report prior knowledge of the "Maid of Kent's Rebellion." He had turned aside accusations that he had wrongly advised the King that Royal authority was derived from Papal grant, when the King charged and imprisoned him for refusing to take an oath recognizing the King as Supreme Head of the Church under the Act of Supremacy (1534). The false witness Rich had visited More in the Tower of London and pressed him to take the oath of conformity, without success.

At his treason trial, More stuck to the sensible position that as he had not spoken or acted against Supremacy, he could have committed no offense. Under commonly understood principles of law at the time, if his silence were to have any meaning attributed to it, that meaning had to be consent and not opposition. The prosecutors first fell back on testimony regarding certain letters written by More to another "traitor,"¹⁸ urging opposition to the Supremacy, but they could not produce the letters themselves and More denied any such thing. In desperation the prosecution produced Rich, who brazenly lied, claiming that More had made treasonous statements to Rich during Rich's visit to the Tower. In the end, this led to as much embarrassment as anything else, for others present during the Tower interview would not or could not corroborate Rich.

17. See 1 HOWELL, *supra* note 14, at 385-96; C.G.L. DU CANN, *ENGLISH TREASON TRIALS* 45-56 (1964).

18. Fisher's trial is reported in 1 HOWELL, *supra* note 14, at 395-407. The Pope showed his support for Fisher by promoting him to Cardinal. Henry executed Fisher anyway, and was in turn excommunicated by the Pope. CHURCHILL, VOL. II, *supra* note 15, at 64. So much for restraining orders.

The point to be made is that Rich's testimony may have been necessary for outward appearances, but it was a mere formality. No one could have believed him for a minute; but that did not stop the jury from returning a verdict of guilty after a mere quarter of an hour. That is not to say that More could not have saved himself at several points by abandoning his principles, and his sainthood was certainly deserved. Even his bloodthirsty sovereign must have felt a bit guilty, for he reduced the sentence from the usual drawing and quartering to simple beheading.

III. HENRY GARNET - OR "AUTHOR, AUTHOR!(!)"

*Knock, knock! Who's there, in th' other devil's name! Faith, here's an equivocator, that could swear in both the scales against either scale, who committed treason enough for God's sake, yet could not equivocate to heaven. O, come in, equivocator.*¹⁹

Upon the death of Elizabeth in 1603 the English crown passed to James (VI of Scotland and now I of England), the son of Mary Queen of Scots.²⁰ This new, somewhat "alien," king was immediately beset by religious controversy. At a conference at Hampton Court, James tried to make it clear that he was going to continue to steer the ship of state down the religious "middle way" of the Tudor monarchs, "between the extremes of Catholicism and Genevan Protestantism."²¹ As a spiritual and political plan, this was to be as well received by the crew as a course plotted between Scylla and Charybdis. There was to be no religious peace. Puritan and Catholic resisted the conformity prescribed at Hampton Court.

For their part, the Catholics had hoped for some kind of accommodation with the son of their former champion, Mary; and James may have been inclined

19. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc 3.

20. Recent works of fiction based in whole or in part on plots to kill Elizabeth include PATRICIA FINNEY, *FIREDRAKE'S EYE* (1992); KEITH ROBERT, *PAVANE* (1968) (a "novel" consisting of haunting stories set in an imagined England following a successful assassination and Spanish-Popish invasion). The assassination plots were real. See CHURCHILL, VOL. II *supra* note 15, at 110-12, 116-18; see also DU CANN, *supra* note 17, at 116 (alluding to the plots of Ridolphi (1571), Parry (1582), Babington (1586), and the later plots of Potwhele, Collen, Squire, Lopez, Yorke, and Williams); 1 HOWELL, *supra* note 14, at 1095-112 (reporting the trial of Parry (who insisted that he had been working undercover—as an agent provocateur—and who may have been)); CHARLES NICHOLL, *THE RECKONING, THE MURDER OF CHRISTOPHER MARLOWE* 102 (1992); ALISON PLOWDEN, *THE ELIZABETHAN SECRET SERVICE* (1991). Elizabeth had the best secret service of the day, which was headed up by the determined and efficient Francis Walsingham. It was said that Walsingham "over-reached [the Jesuits] in their own equivocation." *Id.*

21. GEOFFREY ELTON, *THE ENGLISH* 118, 145 (1992).

toward toleration. Unfortunately, the Pope would not allow English Catholics to give their secular allegiance to James, and James responded by banishing their priests and fining any who refused to attend the services of his Established Church. "The air seemed charged with plots."²²

Here entered Guy Fawkes and a small group of extremist Catholics, who hatched a plan to fill up the cellars of Westminster with gunpowder and blow up James and the whole Parliament. This was to trigger a Catholic rising, which would be supported by Spanish troops. But somebody talked (someone "warned a relative who was a Catholic peer"—loose lips sink ships); the cellars were searched and the Big Bang stifled.²³ According to Churchill's account, "the House displayed an incomprehensible indifference"²⁴ when James announced the discovery of the conspiracy; but the plotters were run to ground, put on trial, and executed in the thorough, and thoroughly barbaric, manner of the day.²⁵ The report of their trial takes up sixty pages of Volume 2 of Howell's State Trials.²⁶ This brings us to the case of Henry Garnet, the Superior of the Jesuits—I think "The Equivocator."²⁷

For some time prior to the failed Gunpowder Plot, the Jesuits had been associated with Papal resistance to compromise, and with other schemes directed at the overthrow of the Protestant monarchy in England. Now it was alleged that Garnet, who had broken the law of the land in the first instance by entering the realm in violation of a statute,²⁸ had further incited, advised, and directed the conspirators in their activities both before and after the death of Elizabeth—that he "had speech and conference together with these Treasons."²⁹ Indeed, Attorney-General Coke suggested that the conspirators might have turned away from such activities in 1604 had it not been for Garnet. By way of defense, it was

22. CHURCHILL, VOL. II, *supra* note 15, at 151.

23. *Id.* at 152. Catesby warned Monteagle. Unfortunately, Monteagle was a creature of spymaster Cecil. Nowadays the cellars are ceremoniously searched by Tower Yeomen before the opening of Parliament. *Id.*

24. *Id.* at 152. The story goes that they turned to the business of the day—a member's petition for an excused absence, on account of an attack of the gout. *Id.* Perhaps the loss of Parliament would not have been that staggering after all.

25. The "cruel and unusual punishment" of English law required that the prisoner be hung for a short time but then cut down while still alive, so that he could appreciate having his "privates" cut off, and watch his own bowels be "drawn" out of his belly. Then the body was chopped to pieces or "quartered." See NICHOLL, *supra* note 20, at 160; DU CANN, *supra* note 17, at 129-30. Du Cann points out that Coke actually appreciated Garnet's learning and skill as a "casuist, a dialectician, and a theologian," and on account of this appreciation "Garnett was never put to the torture," and was hung. *Id.* Sensitive guy, that Coke.

26. 2 T.B. HOWELL, STATE TRIALS 80 (1813) [hereinafter 2 HOWELL].

27. See the chapter of the same name in GEORGE KEETON, SHAKESPEARE AND HIS LEGAL PROBLEMS (1930).

28. 2 HOWELL, *supra* note 26, at 218, 222.

29. *Id.* at 219.

contended, among other things, that the whole "Powder-Treason" was an invention of the state, intended to undermine the Catholic faith in England. This is a common sort of plea in cases of "terrorism" in our own time.³⁰ It did Garnet little good.³¹ In this regard he was ahead of his time. Garnet was found guilty, although none of the conspirators implicated him beyond this—that he knew of the plot from their "confessions"³² to him and that he failed to turn them in. Garnet ultimately admitted as much but also claimed that he had urged the conspirators not to carry out their plans.

Although the case against him was almost certainly stronger than his apologists have contended,³³ making a sufficiently strong case against Garnet was no mean feat. He had been named as arch-traitor in the original indictment of the plotters, but the case against him was not ready until after the others had been executed. In its preparation we find many unsavory and thoroughly modern techniques, including extended "good cop - bad cop" interrogations and jailhouse eavesdropping.³⁴ Also working against him, in the eyes of his accusers, was his association with the doctrine of equivocation, which Attorney-General Coke

30. The bombing of the World Trade Center in 1993 comes to mind, as does the bombing of the federal building in Oklahoma City in 1995. See Richard Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151, 172-75 (1995-96) [hereinafter Underwood, *Logic*] (such is the way with the "logic" of conspiracy theorists). On the other hand, the burning of the Reichstag by Hitler in 1933 also comes to mind.

31. See MARK NICHOLLS, INVESTIGATING GUNPOWDER PLOT (1991). According to Nicholls, the "Powder-Treason" incident was real enough, and was not an invention of the state. Garnet had no right to counsel (no Johnny Cochran or Michael Tigar), and defending in those days was a tough job under the best of circumstances. Compare with Axtell's Case, 84 Eng. Rep. 1060 (K.B. 1708), in which the commander of the guard at Charles I's execution, charged with murder for playing his part, was told by his judges that the order of execution being traitorous, obedience to it was no defense (adumbrating the Nuremberg War Crimes Trials, which were "unprecedented."). One suspects that Oliver Cromwell would have been no more understanding if poor Axtell had refused to do his duty to the new Commonwealth. Such are the choices afforded the common man.

32. NICHOLLS, *supra* note 31, at 72. "Since English law took no account of the inviolability of confession, even as Garnet's story stood he was guilty of misprision of treason, the bare knowledge and concealment of a treasonable act." *Id.* Oddly enough, the now familiar priest-penitent privilege is today under attack again. For an interesting case in which a cleric became a prosecution witness, see *New Jersey v. Szemple*, 640 A.2d 817 (1994).

33. NICHOLLS, *supra* note 31, at 72.

34. *Id.* at 64. Nicholls writes of the "listening device" used in cracking the Babington Plot (the plot, real or imagined, that nailed Mary Queen of Scots). The listening device being a double agent who regularly intercepted messages sent over Mary's "beer keg post." She smuggled coded dispatches in empty beer kegs, but Walsingham's man, the very brewer trusted by Mary, got to them and decoded them for his spymaster. *Id.*

charged that "Garnet had used to cover his colleagues and to avoid incriminating himself."³⁵ It is the subject of equivocation that justifies the inclusion of Garnet's case in this volume.

The injunction that one must never lie—that no occasion justifies falsehood—has always troubled the inquiring mind, not to mention the tormented body. "Resorting to mental reservations and other internal disclaimers to outward acts has been a matter of life and death in those many periods when religious persecution has raged."³⁶ Equivocation and mental reservation were attractive to hard-pressed English Catholics,³⁷ just as they were to Protestants living in Catholic areas, who "tried to escape persecution by concealing their religious views and by participating in the Mass."³⁸ We are informed that "[d]uring the latter part of Elizabeth's reign, it [the doctrine of equivocation] had acquired considerable notoriety, owing to its employment by the Jesuits . . ."³⁹

At the earlier trial of the conspirators Attorney-General Coke had made much of the fact that one of the plotters, Tresham, had possessed a copy of a Treatise on Equivocation. In his orations Coke observed that the copy seized from Tresham bore an endorsement by a leading Jesuit:

This Treatise is very learned, godly, and Catholick, and doth most fully confirm the equity of equivocation, by strong proofs out of holy Scriptures, fathers, doctors, schoolmen, canonists, and soundest reasons; and therefore worthy to be published in print, for the comfort of afflicted Catholics, and instruction of all the godly.⁴⁰

Garnet had also possessed a copy. Indeed, he was the *author*, although Coke did not know this,⁴¹ and Coke renewed his attacks on the doctrine during his trial:

Their dissimulation appeareth out of their doctrine of equivocation: . . . wherein, under the pretext of lawfulness of a mixt proposition to express

35. *Id.* at 70; 2 HOWELL, *supra* note 26, at 234.

36. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 36 (1978).

37. ALBERT JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 195-215 (1988).

38. BOK, *supra* note 36, at 36 (referring to the Nicodemites).

39. KEETON, *supra* note 27, at 184. Keeton alludes to a passage in Twelfth Night, act 3, sc. 1, as a reference to equivocation. To what extent did the spying associated with the politics and warfare of the age provide motivation for the Perjury Statute of 1563? See also NICHOLL, *supra* note 20, at 265. Cf. 18 U.S.C. 1001, which was "born of war." To what extent was the 1563 law intended to serve some other purposes, what Nicholl refers to as "political expediency . . . courtly infighting, . . . police state repression." NICHOLL, *supra* note 20, at 265. Consider some of our Twentieth Century investigations and prosecutions.

40. 2 HOWELL, *supra* note 26, at 180.

41. See NICHOLL, *supra* note 20, at 72. Garnet was, in fact, the author of the book, but Coke did not know it! *Id.*

one part of a man's mind, and retain another, people are indeed taught not only simple lying, but fearful and damnable blasphemy. And whereas the Jesuits ask, why we convict and condemn them not for heresy; it is for that they will equivocate, and so cannot that way be tried or judged according to their words.⁴²

For his part, Garnet made as good a defense as was possible,⁴³ but Coke turned each point he made against him. On his deathbed, Tresham's pious wife urged him to recant an earlier confession implicating Garnet, and she induced him to sign a statement that he had not seen Garnet during the preceding sixteen years. Garnet's interrogators pressed him for an explanation for so obvious an untruth, to which Garnet answered "I think he meant to equivocate."⁴⁴ This was not the best answer he could have given.

Henry Garnet was executed on May 3, 1606. When he lingered too long in prayer at the "ladder foot" the Recorder, suspecting that the delay was in expectation of a last minute pardon, urged Garnet not to "equivocate with his last breath." Garnet replied, "It is no time now to equivocate."⁴⁵ He mounted the scaffold and was "turned off." It is said that Garnet's trial aroused intense public interest; and "the allusion in the porter's rude jest in Macbeth must therefore have been obvious to all."⁴⁶

42. 2 HOWELL, *supra* note 26, at 234.

43. *Id.* at 238-39. In defense of equivocation, he argued as follows: Concerning Equivocation:

Whereunto he answered, That their church condemned all lying, but especially if it be in the cause of religion and faith, that being the most pernicious lye of all others, and by St. Augustine condemned in the Prisillianists; nay, to lye in any cause is held a sin and evil; howsoever of eight degrees which St. Augustine maketh, the lowest indeed is to lye for to procure the good of some, without hurting any. So then our equivocation is not to maintain lying, but to defend the use of certain propositions; for a man may be asked of one, who hath no authority to interrogate, or examined concerning something which belongeth not to his cognizance who asketh, as what a man thinketh, &c. So then no man may equivocate, when he ought to tell the truth, otherwise he may. And so St. Augustine upon John saith, That Christ denied he knew the day of judgment, viz. with purpose to tell it to his disciples; and so St. Thomas and others who handled this matter, chiefly under the title of Confession.

Id.

44. *Id.* at 235.

45. *Id.* at 356-58.

46. KEETON, *supra* note 27, at 192. The allusion to Garnet in Macbeth seems to have been recently "discovered" by Garry Wills, who has apparently written of it in *WITCHES AND JESUITS: SHAKESPEARE'S MACBETH* (1994) (reviewed in *THE NEW REPUBLIC*, Nov. 14, 1994, at 32).

IV. THE KING V. RALEIGH

"He hath been as a star at which the world hath gazed. But stars may fall, nay they must, when they trouble the sphere wherein they abide."

Henry Yelverton

Sir Walter Raleigh had founded a colony (admittedly an unsuccessful one), searched for Eldorado in Guiana, vied with Essex for the favor of the Queen, and proved a hero at Cadiz. But at the beginning of the reign of Elizabeth's successor fortune turned against him. He was convicted of treason for conspiring with Spain to the end that King James might be replaced by his cousin, Arabella Stuart. Like Garnet, Raleigh was Coke's victim. According to the indictment, Raleigh had conspired with Lord Cobham, whose role was to get a rather large sum of money from the Austrian Ambassador to bankroll their activities. It was charged that Cobham and his brother had told Raleigh that "there would never be a good world in England until the king and his cubs were taken away."⁴⁷ And, according to Attorney-General Coke, the prosecution would prove all this with proper evidence. "We carry a just mind, to condemn no man, but upon plain Evidence."⁴⁸ By modern standards, and many would say by the standards of the day, the prosecution produced no such evidence. Moreover, Coke's conduct in the case was monstrous even for Coke.

What passed for evidence were statements by various persons, some accusers and some accomplices. Most were in records of [preliminary] examinations before trial; and some had been taken by men who now sat in judgment of the defendant. Only one witness, a ship's pilot named Dyer, testified *viva voce*.

The evidence began with readings from the examinations of Lord Cobham. The Justices rebuffed Raleigh's demand that Cobham give his testimony in court—"Call my accuser before my face . . ."—as well as his insistence that "[t]he Proof of the Common Law is by witness and jury (and not by deposition or 'examination')." ⁴⁹ The persistent Raleigh fell back on the "Law of God":

[W]here the Accuser is not to be had conveniently, I agree with you; but here my Accuser may; he is alive, and in the house. Susanna had been condemned, if Daniel had not cried out, 'Will you condemn an innocent Israelite, without examination or knowledge of the truth?' Remember, it is absolutely the Commandment of God: If a false witness rise up, you shall cause him to be brought before the Judges . . .⁵⁰

Alas, no appeal to authority could move this Court.

47. 2 HOWELL, *supra* note 26, at 3.

48. *Id.* at 5.

49. *Id.* at 15-16, 18-19.

50. *Id.* at 19.

In addition to Cobham's out-of-court (not to mention unsigned)⁵¹ denunciations of Raleigh—it was all Raleigh's fault—there were references to Cobham having given his brother a treasonous book which he had gotten from Raleigh. The book, which attacked the authority of the King's title, apparently existed, and had been possessed by Raleigh. But in a second examination (Cobham had a way of retracting almost every accusation he made) Cobham admitted to having swiped it from Raleigh. When Raleigh was pressed to explain how he had gotten such a treasonable book, Raleigh surprised the prosecutor and the judges by admitting that he had stolen it from the house of the old (and dead) Lord Treasurer, William Cecil, whose son, Robert Cecil, was on this very "bench!" From his judicial eyrie, Cecil felt compelled to explain that his father, a Privy Councillor, had only kept such things in the course of his duties.⁵² Indeed, he was forced to concede that while Raleigh had not been an official Counsellor of State, that he too had been "called to consultations."⁵³ Raleigh was admitting that he had stolen a book, but it was going to be pretty hard to convict him for treason for possessing this particular one.

Dyer was called, and it is his testimony that is usually referred to in modern accounts of the trial.⁵⁴ Dyer testified that he had been to Lisbon, Portugal, and to a merchant's house. A "Portuguese gentleman" there had asked him from where

51. *Id.* at 15.

52. This reminds me of the old Ohio judge who asked one of his friends to make sure, on the judge's death, to remove all the pornographic pictures and magazines from his office desk. They were only there for official purposes, having been seized and used as evidence in obscenity cases. He didn't want anyone to get the wrong idea, you see. This story was told to me by a well-respected federal judge, who had known the collector. On a more sinister note, the old Lord Treasurer William Cecil was the same Lord Burghley (Burleigh) who took over Walsingham's intelligence work after the old spymaster's death on April 6, 1590. And it was his son, Robert Cecil, who did the real work, and took over the whole program, after Burghley's death. *See also* NICHOLL, *supra* note 20, at 221. Nicholl contends that Christopher Marlowe was a part-time spy in Walsingham's service, and that he was murdered during the "Court Wars (Raleigh v. Essex)." Of Cecil, the new spymaster, he has this to say:

Amis all these ructions that attend the last years of Elizabeth and the first years of James, there is one figure who continued to rise, and to ride the troubled waters of the succession, who was indeed the principle prosecutor of Raleigh (Raleigh) an Northumberland (Percy, who was imprisoned for life for having 'prior knowledge' of the Gunpowder Plot) in his role as Mr. Secretary (Secretary of State, Walsingham's old office). That is, of course, Sir Robert Cecil . . . [H]e is the one who emerges from these years as the chief manipulator and broker of political power.

Id. at 333-34. Nicholl tells of other links between Cecil and banned tracts. *Id.* at 271.

53. 2 HOWELL, *supra* note 26, at 21.

54. *See* Kenneth Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L.BULL. 99, 100-01 (1972).

he hailed. Upon learning that Dyer was English, the gent asked if the new King had been crowned yet. Dyer replied that he had not been, whereupon the gent replied that there would never be a coronation "for Don Raleigh and Don Cobham shall cut his throat ere that day come."⁵⁵ Today we would recognize this as inadmissible hearsay evidence. Raleigh argued plausibly and forcefully that Dyer's recitation of the out-of-court statements of this absent, unknown, unexaminable Portuguese had no probative value. "This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me."⁵⁶

Up to this point Coke had been merely bombastic, unethical, and utterly ruthless. Now he went ballistic. When the court could quiet him down to continue with his proofs, Coke played his final card. He produced a letter from Cobham retracting any previous retractions he had made and thoroughly damning Raleigh once more, and adding a new charge that Raleigh had agreed to spy for the Spanish Ambassador for a yearly stipend of L1500.⁵⁷ As usual, the glib Raleigh had an excuse or explanation for the charge—that Cobham had acted as a relay for such an offer, but for the purpose of furthering peace with Spain, that Raleigh never saw any money, and that he never took Cobham seriously anyway. And not to be outdone by Coke, Raleigh produced his own letter (a counter bunny-out-of-the-hat) from Cobham retracting Cobham's (Coke's) latest accusations:

I protest upon my soul before God and His Angels, I never had conference with you in any treason nor was ever moved by you to the things I heretofore accused you of. And for anything I know you are innocent and as clean from any treasons against the King as is any subject living. And so God deal with me and have mercy on my soul as this is true.⁵⁸

Raleigh wondered aloud, "Now I wonder how many souls this man has! He damns one in this Letter, and another in that."⁵⁹

We may, if we wish, treat Cobham as the perjurer that justifies the case's inclusion in our little collection. It was his "accomplice" or "co-defendant's" confession that was the case against Raleigh. And at this point one would have expected the prosecution to be abandoned even if he had appeared and testified in court. He had been thoroughly impeached by his own inconsistent statements. But a court that does not accord the accused a right of confrontation, and does not recognize the dangers of hearsay, will not likely be swayed by inconsistencies in the testimony of the chief witness for the prosecution. Coke had the brass to suggest that Raleigh had tampered with his witness! The Lord Chief Justice then

55. 2 HOWELL, *supra* note 26, at 29.

56. Graham, *supra* note 54, at 101 (citing 1 JARDINE, HISTORICAL CRIMINAL TRIALS 436 (1832)).

57. 2 HOWELL, *supra* note 26, at 26-28.

58. *Id.*

59. *Id.* at 28-29.

intervened to suggest that both letters might be considered so long as the court could be assured that the statement offered by Coke had been given "voluntarily," and not procured under torture or by a promise of leniency. A member of the "bench" played the part of witness by assuring the court that there had been no threat or favor. The benchman in question had been present at Cobham's "examination."⁶⁰ As in More's case, the jury was out for a mere quarter of an hour before returning a verdict of guilty.

In the end it fell to Attorney-General Yelverton to call for Raleigh's head. Although he had been convicted of high treason, Raleigh had been released from the Tower, and given the rank of Admiral, so that he could go on one more expedition to the new world for the glory and profit of the King. "[But] Raleigh's dream of finding gold on the Orinoco River, which had cheered his long confinement, ended in disaster in 1617. . . . [This last adventure] had merely affronted the Spanish governors of South America."⁶¹ Official policy now flipped to favor the appeasement of Spain, and Raleigh was to die on the application of the Spanish ambassador—as an enemy of Spain!

How ironic that the old capital sentence, based on his alleged friendship with Spain, would be revived, and serve as justification for his beheading. Even more ironic was the fact that Raleigh might not have returned from his failed expedition had Lord Bacon (then Chancellor of England!) not previously advised him that his release from the Tower and commission as Admiral had surely amounted to a pardon.⁶² Someone should have sued for malpractice.⁶³

V. "KIDNAPPED!" - ANNESLEY V. EARL OF ANGLESEA

The young heir to some of the greatest estates in Ireland is kidnapped and sold into indentured service by his evil uncle, so that the latter might claim the title. The boy is sent to the Americas, but eventually returns to reclaim what is rightfully his, after having served his time as a "common slave," and after a tour

60. *Id.* at 29.

61. CHURCHILL, VOL. II, *supra* note 15, at 160.

62. DU CANN, *supra* note 17, at 110.

63. Like Thomas More, Bacon was prosecuted in the political wars - in his case for judicial bribe-taking. However, Bacon was guilty of the offence for which he was convicted. Coke, his arch-enemy, sat on the investigating Committee. See CATHERINE DRINKER BOWEN, FRANCIS BACON: THE TEMPER OF A MAN (1963); DANIEL KORNSTEIN, SHAKESPEARE'S LEGAL APPEAL 194-98 (1994); JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 334 (1984). Can Bacon's fall truly have arisen from what was known at the time as the "Affair of the Water Gate" as has been suggested by ANTHONY FLEW, THINKING STRAIGHT 35 (1977).

of duty in the British Navy (worse yet?). He wins his case in Court! It reads like a nice movie script—but it actually happened!

We lawyers find our first mention of James Annesley in the old reporters, specifically in Volume 17 of the State Trials in *The Trial of James Annesley and Joseph Redding*, a murder case tried in the Old Bailey in 1742.⁶⁴ Some time after his return from the colonies, Annesley and his side-kick Redding got into an altercation with a gamekeeper and his son. Annesley was armed with a gun of some kind. The gamekeeper, Thomas Egglestone, was occupied with a fishing net. The men had words, and Redding laid hands on Egglestone. Annesley was heard to swear "God damn your blood, deliver your net, or you are a dead man."⁶⁵ Defense lawyers will tell you that these are harsh words, and "bad facts." We know that the gun discharged, and that Egglestone fell dead, shot in the side.

John Gifford, who was the long time lawyer of the sitting Earl—the evil uncle, prosecuted Annesley. In the subsequent battle over the Earldom Gifford would testify that the old Earl had told him:

I am advised that it is not prudent for me to appear publicly in the prosecution, but I would give L10,000 to have him hanged. . . . I am in great distress; I am worried by my wife in Ireland; Mr. Charles Annesley is at law with me for part of my estate, and [i]f I cannot hand James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right, if he will remit me into France L3,000 a-year; I will learn French before I go.⁶⁶

Gifford's testimony was found to be not within the attorney-client privilege. As to the French lessons, the directors of the Hugo language instruction company would have been gratified.

In the end, it was the forensic evidence that carried the day. Progenitors of Drs. Henry Lee and Michael Baden,⁶⁷ Surgeons James Bethune and John Perkins swore that the projectile entered the body on the left side, just below the ridge of the hip bone, and had traveled upward.⁶⁸ There were "blisters" three or four inches higher on the right side of the body, which along with the probes were taken as evidence of the upward track of the ball. Defense counsel successfully argued that this was inconsistent with the testimony of the prosecution witnesses that Annesley had leveled the gun and fired intentionally. Instead, it was argued

64. 17 T.B. HOWELL, STATE TRIALS 1094 (1816) [hereinafter 17 HOWELL].

65. *Id.* at 1099.

66. 17 HOWELL, *supra* note 64, at 1139, 1224. The Trial In Ejectment between Campbell Craig, Lessee of James Annesley, Plaintiff, and Richard Earl of Anglesea.

67. The "O.J." defense doctors. See also Richard Underwood, *X-Spurt Witnesses*, 19 AM. J. TRIAL ADVOC. 343 (1995-96) [hereinafter Underwood, *X-Spurt Witnesses*].

68. 17 HOWELL, *supra* note 64, at 1121-24.

that the gun went off accidentally, perhaps after being grabbed. The jury found that the death was accidental, resulting from a "chance-medley."⁶⁹

With the murder charges behind him, Annesley was free to press his action for ejectment, to recover his lands and titles. But had the Lady Altham bore a son to the prior Baron Altham and Earl of Angelsea? Given the status of the Lord and Lady, the relative privacy, the science of the day, and the incentives for perjury presented by the high stakes, it is not surprising that the testimony ended up being wildly conflicting. One modern commentator states that "[i]t is highly probable that both sides suborned perjury."⁷⁰ One witness produced by the Earl, Mary Heath, was actually charged with perjury and later tried; but she was acquitted.⁷¹ In the end the court found for James, although he never actually got the land or the titles. Perhaps this is not the stuff of a Disney movie after all. It was too dirty a business.

VI. "NON MI RICORDO"—OR "MY DARLIN' CAROLINE"

*"It is impossible in a court of law to place confidence in the evidence of a witness who can be reduced in cross-examination to saying, 'I do not remember,' even though there is the possibility that his first statement was right."*⁷²

The domestic affairs of the British Royals have long provided the world with spectator sport. The recent, indecorous conduct among the Windsors is just the latest chapter in the book of scandals. Indeed, George IV of the wacky House of Hanover, the least eccentric son of George III, and his irresponsible and not particularly attractive Queen, Caroline of Brunswick, provided one of the more bizarre episodes in the saga (reported in the tabloids of the day, too).⁷³ Their knot

69. *Id.* at 1139-40.

70. David Fried, *Too High A Price For Truth: The Exception To The Attorney-Client Privilege For Contemplated Crimes And Frauds*, 64 N.C. L. REV. 443, 448 (1986).

71. 18 T.B. HOWELL, *STATE TRIALS* 1 (1816).

72. J.W. EHRLICH, *THE LOST ART OF CROSS-EXAMINATION* 100 (1970).

73. It is said that the marriage provided him with the means to liquidate his debts. In telling the story of Queen Caroline's Case, I rely on WINSTON CHURCHILL, *IV HISTORY OF THE ENGLISH SPEAKING PEOPLES, THE GREAT DEMOCRACIES* 14-22 (1958) [hereinafter CHURCHILL, VOL. IV]; ROGER FULFORD, *THE TRIAL OF QUEEN CAROLINE* 210-11 (1968); ASHER CORNELIUS, *THE CROSS-EXAMINATION OF WITNESSES: RULES, PRINCIPLES AND ILLUSTRATIONS* 331-75 (1929). Fulford's work is by far the most complete and the most interesting account. It even contains illustrations from the satirical pamphlets of the day, one of which portrays George in a *kettle* accusing Caroline in a *pot*. The pamphlet likens the royal couple to Nero and Octavia.

was tied in 1796. However, this was not his first marriage, a fact that would later come back to haunt him. George had wed a commoner and a Catholic, Maria Fitzherbert, who had already been twice widowed. Of course, this would not do at all—if for no other reason than that the marriage was “illegal.”⁷⁴ It was inevitable that a second bride would be forced upon George, who was then still Prince of Wales.

This new marriage got off to a bad start. “George was so appalled at the sight of his bride that he was drunk for the first twenty-four hours of his married life. A few days after his wedding he wrote his wife a letter absolving her from any further conjugal duties.”⁷⁵ Somehow, in this limited window of opportunity, the two managed one child, Princess Charlotte, who was destined to die in childbirth in 1817.⁷⁶ In any event, George gave Caroline the boot in 1814, having taken up an adulterous relationship with Lady Jersey. The would-be Queen (again, at this point she was still the Princess of Wales) left the country for an extended tour of Europe. George thought that her reported misconduct during this tour provided him with the ammunition he needed for a divorce. Upon his accession to the throne he forbade her return. She returned anyway. This led to the famous Trial of Queen Caroline, which opened in August of 1820.

These were not criminal inquiries, but rather proceedings on a bill introduced in Parliament to deny Caroline her “Title, Perogatives, Rights, Privileges, and Pretensions of Queen Consort of [the] Realm, and to dissolve the Marriage . . .” Nevertheless, the trial is a famous one that is remembered as the source of an obscure rule of evidence governing impeachment and cross-examination, and for Henry (Lord) Brougham’s moving speech in defense of the Queen. But of particular interest for present purposes was Brougham’s cross-examination of the principal witness against the Queen. It provides the classic illustration of the destructive effect of the concession by a witness “I do not remember,” which has been called “the unprepared layman’s haven.”⁷⁷

Some discussion of the evidence rule—“The Rule in the Queen’s Case”—is probably in order. Conventional practice requires the cross-examiner who intends to show that the witness on the stand made a prior statement inconsistent with his or her trial testimony to “lay a foundation” for it by calling the witness’s attention to the time, place of the making of the prior statement, the person to whom it was made, and the substance of it. The usual justification for this is that the witness may admit making the statement, rendering it unnecessary for the court to hear from an additional contradictory or impeaching witness. The

FULFORD, *supra*, at 210-11. The coming storm was hinted at in the story line of the popular play and movie, *THE MADNESS OF KING GEORGE*.

74. ELTON, *supra* note 21, at 192. See The Act of Settlement, 1701, (Eng.) which “[f]orbade any person to sit on the throne who was not a communicant member of the Church of England.” *Id.*

75. CHURCHILL, VOL. IV, *supra* note 73, at 16-17.

76. The line was perpetuated by George’s brother, the Duke of Kent, through his daughter Victoria.

77. See *Bevevino v. Saydjari*, 76 F.R.D. 88, 91 (S.D.N.Y. 1977).

Solicitor-General and Lord Chancellor called Brougham to task on at least one occasion for failing to supply sufficient foundation. Brougham retorted that their insistence on such formalities could "prevent the most perjured witness from being detected."⁷⁸ The more specific rule, or "rulette" as Professor Maguire described it,⁷⁹ to emerge from the Queen's Case, was a variation on the more general one—an additional requirement being that if the prior inconsistent statement be in writing (for example, in a letter), then the witness being interrogated must be shown the document.⁸⁰ Maguire speculated that the opinion setting forth this "rulette," one of several given in the course of Caroline's trial, may have been based on a mistaken notion that the cross-examiner is somehow attempting to prove the contents of the writing, and that the "best evidence" or "original writings" rule therefore requires it to be produced, or the equally erroneous notion that only the writer of the document may testify as to its authorship.⁸¹ In any event, generations of trial lawyers have complained, like Brougham complained, that these foundation requirements "give a shifty witness too good an opportunity to think up a lying escape from what ought to be a tight corner."⁸² British law, and the Federal Rule of Evidence, Rule 613(a), have since dispensed with such niceties.

As for Brougham's opening speech, it is said that it "was the most magnificent display of argument and oratory that had been heard for years."⁸³ Lord Erskine was so moved that "he rushed from the House in tears."⁸⁴ At the close of his speech, Brougham reminded the Lords of the tale of Susanna and the Elders⁸⁵—that in the Queen's case as well as in Susanna's, it was the small details in the prosecuting witnesses' stories that did not match up and which proved their perjury. But the most memorable part of Brougham's speech was his thinly veiled threat to go into the matters of the King's adultery and his illegal marriage. One latter-day commentator referred to this as a bit of "greymail."⁸⁶ Brougham "reminded" the Lords:

[T]hat an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and,

78. CORNELIUS, *supra* note 73, at 338-39. Cornelius, among others, has highlighted this rather nasty exchange.

79. JOHN MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 56-57 (1947).

80. The Queen's Case, 129 Eng. Rep. 976 (C.P. 1820).

81. MAGUIRE, *supra* note 79, at 56-57.

82. *Id.* at p. 57. Quite frankly, I am old-fashioned, because I have found that impeachment only works when the formalities are followed. Short-cuts tend to be self-defeating. I like the theatrical possibilities provided by formalities. Then again, I like hypothetical questions too - they are an opportunity for "summing-up."

83. FULFORD, *supra* note 72, at 121 (quoting diarist Charles Greville).

84. *Id.*

85. See Daniel 13:51-62.

86. THOMAS SHAFFER, AMERICAN LEGAL ETHICS 204-06 (1985).

amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁸⁷

This famous passage, "wrenched out of its context," is often cited in justification of the most extreme conduct by counsel.⁸⁸

The brief for the prosecution accused the Queen of having carried on an adulterous relationship with Bartolomo Pergami [or Bergami], "a foreigner of low station." One of the important witnesses against the Queen was Theodore Majocchi, an Italian servant who had been in the Queen's employ during the period of her travels. His examination-in-chief focused on the sleeping arrangements of the Crown Princess and Pergami, how they were always close together with some means of moving undetected between them, of whispered conversations (pillow talk?) overheard by Majocchi, of other incriminating details (Majocchi often made the beds), and of a shipboard tent and bath shared on a return trip from Jaffa to Italy. My favorite testimony (as time-traveling voyeur) has Majocchi sleeping immediately below the deck where this tent affair was pitched, and hearing the creaking of a bench overhead.⁸⁹ This was pretty racy stuff. Another choice, if nasty, bit of testimony was spun off from the fact that the Crown Princess and Pergami often traveled for extended periods in a closed carriage. Majocchi stocked the coach with essentials, and always made sure that there was a special bottle on board—"For Pergami to make water in." A nice touch, that.⁹⁰

Brougham began his cross-examination gently, but it was not long before he began to detect equivocation in Majocchi's answers. When pressed, the witness would back off from prior assertions, and "[t]o much of Brougham's cross-examination the replies of Majocchi were uniform '*Non mi recordo*' . . . [words that] were to pass into the language as a phrase for expressing something which it was not convenient to remember."⁹¹

Brougham's cross-examination scored many points with the assembled Lords. Lord Darlington [a Brougham ally] made a request for transcripts of the testimony—today we would call it "daily record"—so that he could examine the evidence closely. He volunteered (no doubt to Brougham's delight—was this prearranged?) that "[t]he evidence given in support of the bill, on the first day, had made, he confessed, a very strong impression on his mind: but the cross-examination

87. RICHARD H. UNDERWOOD & WILLIAM FORTUNE, TRIAL ETHICS 54-55 (1988 & Supp. 1993) [hereinafter UNDERWOOD & FORTUNE].

88. For a discussion of the passage see DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973); UNDERWOOD & FORTUNE, *supra* note 87, at 54-55.

89. FULFORD, *supra* note 73, at 68.

90. *Id.* at 73.

91. *Id.* at 64.

which took place yesterday had, on the contrary, tended very much to diminish that impression."⁹² Louisa Demont, another of the Queen's household servants in Italy, also gave evidence damaging to the Queen. Another of the Queen's defense counsel, a Barrister Williams, cross-examined her relentlessly as well. Indeed, it was during his cross-examination of Demont regarding letters that she had written and which he hoped would contradict her direct testimony, that the question as to the proper foundation for the impeachment of a witness with a prior inconsistent statement in writing was put to the Justice.⁹³ Cornelius goes so far as to credit Williams' cross-examination as "the greatest example of its kind in the history of great English trials."⁹⁴ It certainly illustrates the way that witnesses attempt to equivocate, and how they may be pinned down.

Specifically, the witness testified as to several instances in which she had seen the Princess and Pergami together in various states of undress, and to one occasion on which the Princess sat for a portrait, naked to the waist.⁹⁵ Defense counsel did not attack the witness's stories directly, but instead proved that the witness had made prior favorable (contradictory) statements to others regarding the Princess's character, and had expressed the view that false rumors were being spread about her behavior. Throughout, the witness was too clever, attempting to avoid counsel's questions by quibbling over the pronunciation of names, and consistently failing to remember any detail or conversation that might be proved against her. Counsel "persistently insisted that the witness either swear she did not utter these [statements or] sentiments or say that she could not deny them under oath. There is always a doubt in the mind of a judge or jury as to the veracity of a witness thus accused when he relies on his absence of any recollection thereof."⁹⁶ Having elicited a series of obvious evasions and implausible denials from the witness, counsel followed up his challenge by producing the contradictory witness as a sort of coup de grace. Unfortunately, the impeaching witness was herself vulnerable, counsel for the prosecution was able, and the contest swung back and forth.

In contrast to the lower class, discredited, in some cases biased, and no doubt in some cases suborned witnesses for the prosecution, the defense presented the testimony of a number of Lords, Ladies, and other worthies who had at various times traveled with the Princess during her adventures in Italy. They denied witnessing any shenanigans. At the close of the "trial" a majority of the Lords still credited the accusations, and supported the bill—but only by a very slight majority of nine votes (108 for and 99 against on the "third reading" of the bill). The slimness of the margin was fatal, and on motion the bill was shelved—for all practical purposes indefinitely. The Lords let out a collective sigh of relief. And

92. *Id.* at 69.

93. See CORNELIUS, *supra* note 73, 364-74 (setting forth the transcript with commentary).

94. *Id.* at 349.

95. This adumbrated the numerous photos of the Duchess of York.

96. CORNELIUS, *supra* note 73, at 352.

the result was taken, by the Queen and her supporters, as something of a victory. The public seemed to support the dropping of the bill. On the other hand, as the Lord Justice wryly observed . . . "[that] to have upon our journals four different resolutions, all founded upon our avowed convictions of her guilt, and then neither to withdraw those resolutions, nor to act upon them appears to me to be perfectly absurd, and, both to the country and to her, unjust . . ." ⁹⁷

The truth was that whatever had been in the details, Caroline's conduct had been irresponsible throughout; and the Queen's "victory" was short-lived. Public opinion was predictably fickle. When the King was crowned the next summer, Queen Caroline was turned away from Westminster Abbey and jeered by the crowd with cries of "Shame, shame." She died two weeks later, some say of a broken heart. The doctors said it was a bowel problem.

It is a curious aspect of human nature that people (even lawyers—especially lawyers!) do not learn anything from history. If you examine Mr. Nixon's "Watergate" tapes, you will hear him coaching his minions to "just say you don't remember"—the thought being that this would minimize the risk of a perjury rap.⁹⁸ Here is the reaction of one of the President's prosecutors:

In a classic passage [in the tapes], the President educated Haldeman in the [fine] points of giving evasive testimony under oath about possibly incriminating matters: "If you're asked, you just say, 'I don't remember, I can't recall, I can't give an answer to that that I can recall.'" . . . No one who listened to it could ever again feel quite the same way about the American Presidency.⁹⁹

Yet we heard a recital of the same catechism during the recent "Whitewater" hearings.¹⁰⁰ Was anyone fooled this time?

97. FULFORD, *supra* note 73, at 242.

98. Actually, a witness can be convicted of perjury on the basis of an answer that he or she "does not remember" an event, if the prosecutor can prove beyond a reasonable doubt that the witness does in fact remember the event. See *e.g.*, *U.S. v. Biaggi*, 675 F. Supp. 790 (S.D.N.Y. 1987).

99. RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* 205 (1977).

100. See William Safire, *The Senate is Doing a Better Job Than the House on Whitewater Scandal*, GREENSBORO NEWS & REC., Aug. 7, 1994, at F4. Safire took exception to answers of witnesses that they had "no independent recollection" of unfavorable facts reflected in documents the accuracy of which they were unwilling to dispute. Safire described this as a "slippery lawyer's way of saying, 'I don't remember, so you can't ask me more about it.'" He alluded darkly to 2 U.S.C. §192 (1938), which makes it a misdemeanor to tell "half-truths" to Congress. *Id.* Only Congresspersons are allowed to tell half-truths.

VII. JUSTICE IN AMERICA

*Way down in Lone Green Valley
Where roses bloom and fade
There was a jealous lover
In love with a beautiful maid.
"A Jealous Lover In Lone Green Valley"*

In the 1930s, Edwin Borchard wrote *Convicting The Innocent*, a classic study of injustice in the criminal courts.¹⁰¹ Willful perjury was a substantial factor in nineteen of the sixty-five cases in his collection.¹⁰² Two of my favorites are the bizarre Kentucky case of Condry Dabney, and the even more remarkable Mississippi case of Thomas Gunter. Dabney was convicted of murdering a person who later turned up very much alive, his conviction being more or less attributable to the revenge testimony of a disturbed young woman. "Pop" Gunter was convicted of murdering his no-account son-in-law on the perjured testimony of his daughter Pearl and granddaughter Dorothy Louise. Pearl had actually done the killing, and she had coached Dorothy Louise to play a supporting role—children do lie from time to time, contrary to the assertions of an army of social workers and pop psychologists.¹⁰³ The case was weird, and it is also strangely contemporary. It is suspiciously like the sensational burning bed/battered spouse stories of the 1970s and 80s, with a couple of twists. But let's get to the Dabney case, which is rather straightforward by comparison.

In January of 1925, Condry Dabney left his family in Coal Creek, Tennessee, for a job mining coal in Coxton, Kentucky. After six months or so in the mines, Dabney bought an old car and started a taxi service. His life as an entrepreneur was to be cut short by a combination of panic in the community and stories told by yet another incarnation of Potiphar's wife.¹⁰⁴

101. EDWIN BORCHARD, *CONVICTING THE INNOCENT* (1932).

102. *Id.* at 379-80 nn.12-13, 15.

103. David Ross, *UNDERSTANDING THE CHILD WITNESS: IMPLICATIONS FOR INVESTIGATING CHILD ABUSE* (California Legal Education Services). This video seminar for lawyers illustrates the power of suggestion, and how the testimony of the child witness can be affected by irresponsible interviewers. See *Panel Discussion*, 11 *TOURO L. REV.* 167 (1995) ("O.J." lawyer and professor Barry Scheck: "[T]here has been an assumption among experts that children do not lie. [] Frankly, as a father, it always struck me as incredible that people will take this view."); see also Robert Honts, *Assessing Children's Credibility: Scientific And Legal Issues In 1994*, 70 *N.D. L. REV.* 879 (1994) ("[C]hildren, like adults, can be misled by suggestion. . . . Children were also found to be willing to tell deliberate lies under a variety of situations. . . . [C]hildren will tell lies about serious matters in situations they believe to be important."). *Id.*

104. The case is a cross between the railroadings of Joseph and Sören Qvist. In the latter case the beloved Pastor Qvist was executed for the murder of his handyman.

The panic began shortly after Dabney's arrival in Coxton, when a sixteen-year old girl disappeared. After he had started his taxi service, three more women disappeared. Two were married. The third was fourteen-year-old Mary Vickery. Two men, William Middleton and Condly Dabney, were suspected in the case of Mary Vickery, on the strength of reports that they had been seen driving Mary around. However, the grand jury failed to indict either man. That fall, Dabney returned to Coal Creek, Tennessee, after work in the mines there picked up again.

Enter U.S. Marshal Adrian Metcalf, who was pursuing a tip that there was a mineshaft still hidden in Bugger Hollow near Ivy Hill, not far from Coxton. His search led him to some clumsily concealed clothing, and after some digging, the body of a female.

Now as one might suspect, the forensic sciences were somewhat limited in and around Coxton, Kentucky, circa 1925. The authorities assumed that the body was Mary Vickery's, and her father identified the remains, mainly because of a ring supposedly found at the scene. The ring, covered with decayed flesh, had been proffered on a stick to Mr. Vickery, and he thought it looked like the ring he had bought for Mary for her birthday. He also recognized an L-shaped repair to a stocking found at the scene (Mary had had a similar repaired stocking), and thought he could identify hair found with the body as being "like" Mary's hair.

Ultimately, the police arrested Dabney and indicted him on the strength of information provided by Marie Jackson, a woman in her mid-twenties, whom Dabney admitted having "dates" with while he was running his taxi service in and around Harlan. Dabney maintained throughout his ordeal that Jackson "swore against [him] because [he] would not leave [his] wife and go with her."¹⁰⁵ Much later, after his vindication, Dabney's wife provided some corroboration: "I saw a letter my husband received from a woman who signed her initials, 'M.J.,' and asked my husband to come back to Harlan with her," said Mrs. Dabney. "He denied at the time that he knew who the woman was."¹⁰⁶ At trial, Marie Jackson testified that Dabney drove her and Mary Vickery to the old mine site, and requested Marie to leave. From some distant point Marie watched as Dabney assaulted Mary Vickery, clubbed her to death, and then dumped her body in the mineshaft. Several other women supported this testimony, testifying that they had seen Mary Vickery in Dabney's cab on the day of her disappearance. On March 31, 1926, Dabney was convicted and given a life sentence.

Dabney's appeal was still pending when, almost a year later, Patrolman George S. Davis saw the name "Mary Vickery" penned in a hotel register in Williamsburg, Kentucky. He alerted Sheriff Ward, who took the girl to her father and stepmother for identification. Mary Vickery was indeed alive and well, and back from "just a travelin' round."¹⁰⁷ She had apparently run off, having been unable to get along with her stepmother—during the investigation that led up to

Years later the murder victim turned up in Parson Qvist's village, very much alive. See JANET LEWIS, *THE TRIAL OF SÖREN QVIST* (1986).

105. *COURIER-JOURNAL* (Louisville, Ky.), Mar. 20, 1927.

106. *COURIER-JOURNAL* (Louisville, Ky.), Mar. 22, 1927.

107. *COURIER-JOURNAL* (Louisville, Ky.), Mar. 20, 1927.

Dabney's arrest and trial, such discord had been denied by Mr. Vickery. She had been driven to Harlan by a taxi driver who must have been Berea, and then to Mount Vernon, where she worked as a domestic. At one point she said that she spent some time in the home of T.J. Nicely, the County Clerk of Rockcastle County. Apparently she had been using the name of Rose Farmer.¹⁰⁸ "I heard that they'd convicted Dabney and that he was supposed to have killed me," she told the authorities. When she was asked why she hadn't come forward she said "I just never thought of that."¹⁰⁹

The prosecutor in Dabney's case, G.J. Jarvis, launched a detailed investigation, and joined Dabney's defense attorney, C.G. Rawlings, in requesting a pardon from Governor Fields. Marie Jackson was unable to even identify Mary Vickery.¹¹⁰

She then concocted another tale, which tied into the killing of two other women, and the disappearance of three local men. Roxy Baker had been killed in Harlan on February 22, 1925. She had been thrown from a car. When a grand jury met to investigate Roxy's death, three young men disappeared from Harlan, and it was suspected that they were involved in Roxy's death. Roxy had been a friend of Mrs. Leila Cole, who disappeared from Harlan in December of 1925. By now it was suspected that the bones found in the mineshaft were those of Leila Cole. Marie Jackson now told the prosecutor that a miner by the name of Charlie Williams had been involved with Leila Cole (who was estranged from her husband), that Mrs. Cole and Williams were the principals in the Dabney case, and that Williams later murdered Cole and threw her body in the mine.¹¹¹ Jackson claimed that she had witnessed the disposal of the body, and that Williams had given her \$50 to keep quiet. Ironically, Williams had been a suspect in the Dabney case, but had been released when Marie Jackson said that she could not recognize him.¹¹² She repudiated this story almost immediately,¹¹³ and was unable to pick out Williams in a line-up.¹¹⁴ By this time it was clear that she was a pathological liar, and that she had been motivated throughout by a desire to hurt Dabney, and a desire to collect a \$500 reward that had been offered in the Vickery matter.

Governor Fields released Condé Dabney from jail. On March 26, Mary Vickery, the girl who had returned from the dead, was wed in Harlan! So there was a happy ending, for everyone except Marie Jackson. She was prosecuted for "false swearing."¹¹⁵

108. COURIER-JOURNAL (Louisville, Ky.), Mar. 21, 1927.

109. COURIER-JOURNAL (Louisville, Ky.), Mar. 20, 1927.

110. COURIER-JOURNAL (Louisville, Ky.), Mar. 22, 1927.

111. *Id.* Dabney later said that he had "overheard a remark in the Harlan County jail to the effect that the body in the mine might be that of a Williams woman." *Id.*

112. COURIER-JOURNAL (Louisville, Ky.), Mar. 24, 1927.

113. COURIER-JOURNAL (Louisville, Ky.), Mar. 25, 1927.

114. COURIER-JOURNAL (Louisville, Ky.), Mar. 26, 1927.

115. COURIER-JOURNAL (Louisville, Ky.), Mar. 27, 1927.

In contrast to the Dabney case, the Gunter case involved perjury in "self-defense." The reader will recall from the introduction to this section that "Pop" Gunter's daughter, Pearl, was married to the jobless, alcoholic, and "philandering" Marvin Drew. The couple quarreled notoriously, and Marvin seems to have been convinced that someone else was the father of Pearl's expected child, or at least he said so. It was not a happy state of affairs, and one night in July of 1929 the neighbors heard a shot and found Marvin dead in his bed with a revolver nearby.

It is of interest that the authorities were at first content to label the case a suicide. But the unhappy couple's daughter (one of three children), Dorothy Louise, who had been sent to relatives for a spell until things settled down, came out with a story of how she had been sleeping with her father when her grandfather, Thomas "Pop" Gunter, came in the room and plugged her dad. When confronted with this revelation, the still pregnant Pearl backed up her daughter's story. "Pop" Gunter was arrested. He pled "not guilty," the defense being that while he had been in the house he had been too drunk to do the deed. Pearl had shot her husband in a fit of rage or jealousy.

Now the law of evidence allows a jury to hear and rely upon the testimony of a child if the judge first determines that the witness has an appreciation of the difference between truth and falsity.¹¹⁶ However, this formula is not much of a test. In this case, the seven-year-old Dorothy Louise did not know what a Bible was, and said that she had only heard of God once, when she went to Sunday school.¹¹⁷ But the judge allowed Dorothy Louise to testify, and she must have made some convincing witness, because the jury convicted "Pop" Gunter and he received a sentence of twenty-five years according to news accounts (Borchard, who calls him Marlin, says he only got five). The widow Pearl and her daughter moved away, and shortly thereafter Pearl gave birth to her fourth child.¹¹⁸

Now things took a curious turn. Pearl sent Mississippi Governor Theodore Bilbo a plea that he pardon her father. She had been the one who had plugged her husband, not poor old "Pop." Pearl made her confession by borrowing from the popular Southern ballad "A Jealous Lover In Lone Green Valley." In the original ballad (it reminds me of "Tom Dooley") a girl is stabbed to death by a jealous suitor. Our *femme fatale* switched the lyrics around, giving us:

Down in a lonely graveyard,
Where the flowers bloom and fade,
There lies my darling sleeping
In a cold and silent grave.
So listen now, dear people,
And hear my story through,
I pray God 'twill warn you

116. For a general discussion, see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 505-07 (1995).

117. WASH. TIMES, June 22, 1930; WASH. EVENING STAR, Nov. 20, 1929.

118. See Plate 2, TIME, Feb. 24, 1930.



Of the fate of Marvin Drew.
He died not broken-hearted
Nor by a disease he fell,
But in an instant parted
From the ones he loved so well.
Down on my knees before him
I pleaded for his life,
But deep into his bosom
Had plunged a forty-five.
But, O, How sad the ending
To sit beside my dear
For I have often told him
My darling don't you fear.
Then he said, 'No, my darling,
Your words can never be,
for I will soon be sleeping
In Hell away from thee.
But listen to me, wifie,
Come closely while I tell,
When I am gone, please don't forget me -
The one who loves you well.
I know I've been a rambler,
I know I've done you wrong,
But don't forget me darling,
Whenever you sing this song.
I want to work for Jesus,
And work both night and day,
For he will gladly help you
And surely lead the way.
The time has come, my darling,
When you and I must part,
The bullet of that forty-five
But kiss our little children,
And tell them I am gone,
Don't let them follow my footsteps
For I have led them wrong.'
This poison 'mule,' dear people,
Did cause this incident,
It stole these children's father,
Who for their love was meant.
To prison went my father,
All innocent of this crime;
I could not long endure this,

My father doing time.¹¹⁹

Judge Pegram took evidence at the request of the Governor, and the evidence convinced the Judge and all the lawyers in the case that Pearl had coached Dorothy Louise to tell her story that "Pop" Gunter had been the shooter. Pearl explained that she could not bear to have her new baby in prison, and that she had always planned to tell the truth once the child was born. She must have been taken by surprise by the initial "finding" that her husband's death was a suicide. "Pop" was granted a ninety-day release, and the grand jury indicted Pearl for murder and for perjury. She pled guilty, but she presented such a sympathetic case that Judge Pegram gave her a suspended sentence!

Governor Bilbo did not share Judge Pegram's sense of justice. When the ninety-day suspension he had granted "Pop" Gunter was up, the Governor refused to grant him a pardon and ordered him back to the clink for the duration.

Somebody ought to be in the penitentiary all the time for the murder of a sleeping man. If Judge Pegram does not believe Mrs. Drew is guilty enough to serve her term, then the man convicted of the murder will have to serve his term. Husbands ought to have some protection.¹²⁰

Governor Bilbo would not have gotten onto "Emily's List."¹²¹ He certainly did not get his way. "Pop" and Pearl, now technically convicted for the same murder, fled Mississippi. I have not been able to determine if they were ever found. Perhaps no one besides Governor Bilbo cared much if they were. There was, and still is, a sort of rough justice, or *lex non scripta*, out in the country—"some people need killin'."

Borchard made the following observations on the Gunter case: "[T]his case of perjury has curious features. There is Judge Pegram's suspension of sentence for Pearl, and even more amazing is Governor Bilbo's Solomonic judgment that, if the real murderer is not jailed, then the wrongly convicted person must serve time. Gunter and his daughter seem to have decided upon their own method of administering justice in this case."¹²²

There have been more bloody endings. Consider the recent cases of Jessee Jacobs and his sister Bobbie Hogan. Texas just executed Jessee for the murder of Etta Urdiales, the former wife of sister Bobbie's boyfriend. This pesky woman had apparently been bothering her former husband for child support. Bobbie enlisted Jessee in a plot to kill Urdiales. There does not seem to be any doubt that the two took part in her slaying, and under Texas law, both could have been

119. This text of the confession comes from TIME, Feb. 24, 1930, at 16-17. Borchard's citation to it was a bit off.

120. BORCHARD, *supra* note 101, at 337.

121. Emily's List is the name of a political action committee (PAC) that "bundles" contributions for feminist candidates.

122. BORCHARD, *supra* note 101, at 344.

sentenced to death for felony murder and conspiracy to murder. But Jessee was tried first, and was sentenced to death as the trigger-person. Later, when Bobbie was tried, the very same prosecutor "changed his mind" about Jessee's role, and told the jury (improperly one assumes, since an advocate is not supposed to assert his personal opinion or belief) that Bobbie, and not Jessee, had actually pulled the trigger. At one point Jessee had confessed everything, but he recanted prior to his own trial and blamed his sister. With a death sentence still hanging over his head, he testified against his sister at her trial, claiming that he had not even known that she was armed when he kidnapped Urdiales and took her to a wooded area for the rendezvous with Bobbie. Sister Bobbie's jury found her guilty of involuntary manslaughter. According to available accounts, they must have believed her story that the gun had gone off accidentally. She got ten years.

One suspects that no one will miss Jessee much. He had been on parole after serving part of a twenty-five to fifty year sentence for murdering a retarded man in Illinois, and he had been on a crime binge for the six months preceding Urdiales' murder.¹²³ But it seems odd to many that the State of Texas, indeed the very same prosecutor, should get away with insisting that Jessee had not been the trigger person when it came time to prosecute Bobbie, and yet still stand by and let Jessee take a lethal injection. Many argued in the press that Jessee's death sentence should have been commuted. Justice Stevens dissented from the denial of an application for a stay of execution, protesting the "self-evident . . . injustice" of it all.¹²⁴

123. For somewhat inconsistent versions of this saga see *Murder by Texas*, N. Y. TIMES, Jan. 5, 1995 at A1; *Guilty, Innocent, Guilty*, TIME, Jan. 16, 1995, at 38. If it is any consolation to him wherever he is now, Jessee Jacobs has become something of a martyr and a folk hero - for a little while.

124. *Jacobs v. Scott*, 115 S.Ct. 711 (1995). Apparently there is no "collateral estoppel;" and perhaps only Bobbie was in a position to argue that point, or benefit from an objection to any prosecutorial misconduct in the second trial (was she complaining, having gotten only ten years?). No one seems to have made a convincing case that the prosecution offered perjured testimony in the first trial (Jessee's), although Justice Stevens cited *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Durley v. Mayo*, 351 U.S. 277 (1956); *Mooney v. Holohan*, 294 U.S. 103 (1935). The scenario is not all that rare. Cf. *Parker v. Singeltary*, 974 F.2d 1562 (11th Cir. 1992).

VIII. THE TRIAL OF LEO FRANK

*Little Mary Phagan, She went to town one day;
She went to the pencil factory To get her weekly pay . . .
She left her home at eleven, She kissed her mother
goodbye; Not one time did that poor girl think
She was going off to die.
"The Ballad of Mary Phagan"¹²⁵*

In this ballad, brutish factory manager Leo Frank, the outsider, the "capitalist," the hated Jew, murders his child employee—"he . . . beat her o'er the head." We are told that the song was a popular one, sung by "a full generation [of] tenant farmers, mill hands, and mountain people" in Georgia.¹²⁶ The problem is that Frank was innocent. The real killer of Mary Phagan was almost certainly Jim Conley, the chief witness for the prosecution. He confessed doing the crime to a ladyfriend, he confessed to his court-appointed lawyer, and before he died he told several other people that he had killed the girl. Notes left with the body were obviously written in his hand. His testimony at trial was implausible. His reputation in the community for "truth and veracity" was bad. But no reasonable doubt would save Leo Frank, who was convicted after a mere two hours of deliberations by twelve jurors who could not help but have been influenced by the mob mentality swirling about them.¹²⁷ Even after a

125. OLIVE BURT, *AMERICAN MURDER BALLADS AND THEIR STORIES* (1958) (quoted in HARRY GOLDEN, *A LITTLE GIRL IS DEAD* xiii (1965)).

126. GOLDEN, *supra* note 125; see also LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (1968); ROBERT FREY & NANCY THOMPSON-FREY, *THE SILENT AND THE DAMNED: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (1988) (containing an excellent bibliography).

127. See Holmes, J., dissenting, in *Frank v. Mangum*, 237 U.S. 309 (1915):

[The] hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the court that the proceeding should not continue on that evening. Thereupon the court adjourned until Monday morning. On that morning when the solicitor general entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge, had a private conversation with [Frank's] counsel in which he expressed the opinion that there would be 'probable danger of violence' if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from court when the verdict was brought in. When the verdict was rendered, and before more than one of the jurymen had been polled, there

courageous Governor who believed him innocent had commuted his death sentence to life imprisonment, a mob took Frank from prison and lynched him. It is said that the site of the lynching is now buried under I-75, one of the busiest highways in the country.¹²⁸ How did this come to pass?

In addition to the atmosphere of mob violence that dominated the proceedings, the case was, quite simply, built around subornation of perjury and prosecutorial misconduct. It provides additional evidence of the practical limits of cross-examination and persuasion.¹²⁹ To prove these points, let's begin with the story that the prosecutor wanted the jury to believe. Then we'll look at the leaks in the prosecutor's case, and how the prosecutor plugged them up.

The background of the case was as follows. It was Saturday, April 26, 1913. Frank had been at the factory most of the day. Mary Phagan came by a little after noon and picked up \$1.20 in pay (for ten hours work) from Frank. Frank left around 1:00 P.M. for lunch. The wife of one of the other employees who had been working on machinery that day left at about the same time. She recalled that when she went out of the factory, she saw a black man who looked like the "sweeper" sitting under the stairs. Frank returned around 3:00 P.M., and worked on a financial report until about 4:00 P.M. when he chatted with Newt Lee the watchman. He told Lee to take a few hours off, and when Lee returned around 6:00 P.M., Frank gave him some instructions regarding his rounds. A former employee whom Frank had fired showed up to retrieve a pair of shoes from his locker. The watchman accompanied him, and the task was accomplished without incident. Frank then left for the day. However, he later phoned for Newt several times between 6:25 P.M. and 7:00 P.M.. He finally got Newt on the last call, and asked if everything was alright. It was never very clear why he made these calls.

As he was making his rounds, around 3:30 A.M., Newt Lee descended to the cellar by means of a trap door and ladder. The light from his lantern strayed upon the body of Mary Phagan lying on a slag heap near the boilers. Her head was bloody, and it looked like she had been struck and then strangled by the sort of cords that were used to tie up boxes of pencils. Such cord was usually stored in the "Metal Room" on Frank's floor. However, there was some in the basement too. There was evidence that Mary's body had been dragged to the slag heap. When Newt was unable to get Frank on the phone, he called the police.

When the police arrived they were accompanied by Britt Craig, a newspaper reporter. Newt took them down the ladder—the same route he had taken before he made his grisly discovery. The detectives went to work. So did Craig. It was he who found two scraps of paper with penciled writing on them. They contained the following notes:

was such a roar of applause that the polling could not go on until order was restored.

Id.

128. GOLDEN, *supra* note 125, at 312.

129. The subject will be addressed in Chapter 8 of my book, titled "The Limits of Cross-Examination" (unpublished manuscript, on file with the author).

he said he wood love me and land down play like night witch did it but that long tall black negro did buy his sef. . . . mam, that negro hire doun here did this i went to make water and he push me doun that hole a long tall negro black that hoo it was long sleam tall negro i wright while play with me.¹³⁰

Craig immediately announced that his story would be that the murdered girl had identified her own killer in her last moments.¹³¹ This was as implausible as it was sensational. In short, it made for great "news." Needless to say, the police immediately arrested Newt, who was long and tall and black.

Further investigation yielded the following particulars. First, the time of death was estimated from Mary's stomach contents to have been shortly after she ate lunch (at about 11:30 A.M.)—a time of death between 12:00 P.M. and 1:00 P.M.. Second, order forms were usually kept on the second floor—Frank's floor. One of the "murder notes" was written on the brown carbon of an order form. Unfortunately, by the time a fingerprint man could get to the notes they had been handled so much that obtaining useful prints was out of the question. There was also some "hair" found near a lathe on the second floor. The police assumed this was Mary Phagan's hair. It also seemed that Frank had acted suspiciously in some ways, on Saturday and thereafter. An understandably desperate Newt told of Frank's nervousness that day. Had Frank insisted that Newt take a couple hours off so that he, Frank, could dispose of the body? When he was taken to identify Mary's body he did not want to look at it and acted strangely. But why had the police thought it necessary to take the factory superintendent down to identify her body anyway? It would seem that suspicion had already been shifted to Frank. People were venting their suspicions, fears, and frustrations, and some feared and suspected this factory manager. On the other hand, at about the same time, one or more of the factory girls was also suggesting that Jim Conley, the sweeper, could have done the killing.

Harry Golden makes the following observation in his book about the Frank case. It sounds a theme that we have encountered elsewhere in the book—the "rush to judgment."

Once divining the man who ought to have committed the crime, police have two reasons and only two reasons for ever trying to convict that man. The prime reason for conviction is their own certainty that the man is guilty. Unfortunately, policemen are no smarter than the best of us. It is not hard to convince one's self of a man's guilt, particularly if the man is by nature an "unpleasant" man, as Leo Frank was. The second reason the police succeed is that circumstances arrange

130. GOLDEN, *supra* note 125, at 19.

131. *Id.*

themselves in so convincing a manner that convicting an innocent man is easier than it ought to be.¹³²

What really made the case against Frank was the story, or rather the stories, told by Jim Conley. The police arrested Conley on May 1, 1913. From the time of his arrest he told detectives a number of different versions of what had happened that fateful Saturday. One trial witness, a Pinkerton detective, testified that as he told his story or stories the police would interrupt him and dictate changes whenever they felt that Conley's "facts" "would not fit" or "would not do."¹³³ Of particular interest was the shift made when the police learned that Conley could write. He had originally told them that he could not. They learned that he could, and that the murder notes were in his hand. He told the story of how Frank was a pervert who had his way with factory employees from time to time, how Frank had killed Mary Phagan when she would not cooperate, and how Frank had dictated the "murder notes" to Conley, who then wrote them down. In one affidavit, Frank dictated the notes on Friday. The police said this would not do because it would suggest premeditation, which was not consistent with the prosecution's theory of the case. Friday was changed to Saturday.¹³⁴ Conley was accommodating. He had to be. He knew that his survival depended on throwing the killing off onto Frank. Although he had only two years of education, and although he had a lengthy "rap" sheet and a history of drunkenness, he knew how to survive in a hostile white world. According to one criminal defense lawyer who followed the case at the time:

[Conley] was a suspect, groping for a defense for himself. When Frank was charged, Conley pinned his hopes on the Prosecuting Attorney . . . Conley had been in the Criminal Courts most of his adult life. He knew better than to talk to anyone except his lawyer when the heat was on him, and was wise enough to go to any length to unload on someone else.¹³⁵

In other words, the case developed as a classic example of deal-making by a street-wise suspect. More will be said of the deal later.

The police had coached Conley until he got the story "right." Frank had struck Mary Phagan when she would not give him what he wanted. He called for Conley to check on her. When Conley told Frank she was dead, Frank enlisted Conley in stashing the body. Conley testified that Frank had to help, and that

132. *Id.* at 29. The predilections of the police, and the partnership between the prosecution and its experts witnesses, will be discussed in Chapter 6 of my book, titled "Professional Ethics" (unpublished manuscript, on file with the author).

133. FREY & THOMPSON-FREY, *supra* note 126, at 40; *see also* GOLDEN, *supra* note 125, at 340.

134. FREY & THOMPSON-FREY, *supra* note 126, at 39.

135. ALLEN HENSEN, *CONFESSIONS OF A CRIMINAL LAWYER* (1959).

Frank had to unlock the elevator so the two could use it to get the body all the way down to the basement. They then went back up to Frank's office where Frank gave Conley paper and pencil and had him write what Frank dictated as the "murder notes." Frank also told Conley to burn Mary's body in the furnace, and promised him \$200 for the help (which was never paid) and assistance if he were arrested. Lincoln put it as well as anyone. "We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot."¹³⁶ As Harry Golden pointed out in his study of the Frank case, "a reasonable doubt is a doubt for which there is a reason,"¹³⁷ and the physical evidence proved that Conley was lying. Even as "reconstructed" by the prosecution, Conley's story was full of holes. There was plenty of "reasonable doubt" about Frank's guilt. In the limited time allowed by the prosecution's theory of the case it was unlikely that Frank and Conley together could have wrapped the corpse (as it was later found), carried it the length of the second floor (where the attack supposedly occurred) to the elevator, taken the elevator to the basement, dragged the body (it appeared to have been dragged) 136 feet from the elevator to the coal heap where it was deposited, returned back up to the second floor (Conley said he took the elevator while Frank climbed the ladder, the only other way up unless one were to exit a back door and come around the outside of the factory), composed the notes found near the body, and carried on the discussions that Conley said they carried on.¹³⁸ Furthermore, Conley had said that he had evacuated his bowels in the elevator shaft that morning, before the killing. During their initial investigation the detectives had gone down the ladder to the basement, and Conley's excrement was on the floor of the elevator shaft, undisturbed. Later, when they used the elevator, the elevator car came down all the way to the floor and smashed the deposit. Frank's supporters have referred to

136. DAVID S. SCHRAGER, *THE QUOTABLE LAWYER* 323 (1986); *see also* DAVID FISHER, *HARD EVIDENCE* 157 (1995). Fisher recounts the Green Beret "Fatal Vision" murders, in which the successful prosecutor argued that the blood stains, and other physical evidence, established Dr. McDonald's guilt:

I can only tell you from the physical evidence in this case that things do not lie. But I suggest that people can, and do. . . . [McDonald's attorney] said earlier that the physical evidence doesn't mean anything—it doesn't speak. It is only the attorneys speaking. [The somewhat contradictory statement followed.] I say to you that the physical evidence simply cries out an explanation.

Id. Cf. *Genesis* 4:10 "And he said, What hast thou done? the voice of thy brother's blood crieth unto me from the ground." In the "O.J." case God was not the only observer. Everything was on T.V., and plenty of money was available, so—the physical evidence said whatever the contending experts said it did.

137. GOLDEN, *supra* note 125, at 204.

138. *Id.*

this as the "shit in the shaft" argument.¹³⁹ The defense did not exploit it to any effect at the trial level, but it impressed Governor Slaton, and he mentioned the details in his executive order commuting Frank's sentence.¹⁴⁰

There were other facts suggesting that Frank was not the killer, but they did not come out at trial. The hair found on the lathe was not Mary's hair.¹⁴¹ The paper upon which the notes were written did not come from the second floor at all. The notes, which seemed to implicate the night watchman, may not have been intended to do any such thing. Students of the Frank case have, for some time, contended that the "night witch" is a creature found in African-American folklore that would strangle children in their sleep.¹⁴² The assumption is that Frank would not have been familiar with the meaning of "night witch." The police were not familiar with it.

Even more interesting was the possibility of outright suppression of certain evidence by Prosecutor Dorsey. Mary Phagan's body was exhumed twice. Mary Phagan had apparently been bitten on the left shoulder, deep enough for the impressions to have evidentiary value. At some point Leo Frank's teeth had been X-rayed so that a comparison could be made. These X-rays were found by an investigator in 1922. His theory was that Dorsey had the body exhumed the second time so that comparisons could be made. When Frank was not implicated the matter was hushed.¹⁴³

Prosecutor Dorsey also bottled up a very important witness—a very capable expert on handwriting and documents by the name of Albert Osborne. Frank's lawyers had tried to hire him, but the prosecution had already paid him a fee and expenses to examine the notes found near the body. Osborne was not only convinced that the notes had been written by a semi-literate, but that they had been the product of the mind of a semi-literate. Furthermore, even if Conley were telling the truth, that Frank had dictated the contents of the notes and that Conley had written down Frank's words, there was no way that the sentences could have been transcribed in the time allowed for the task in even the prosecution's version of the murder. In other words, Osborne would have made an excellent expert witness for the defense. That explains why Dorsey did not call him. Osborne had felt that it would be improper for him to discuss his views with the defense, given his retainer by the prosecution. This is a fine point of ethics, but one which appeals even to modern sensibilities.¹⁴⁴ However, he did finally inform

139. FREY & THOMPSON-FREY, *supra* note 126, at 155.

140. The complete order is reprinted in full in GOLDEN, *supra* note 125, at 320-53.

141. *Id.* at 204.

142. *Id.* at 201-02 (citing Frank's lawyer's and Mary Phagan's own pastor for the "Night Witch" story).

143. *Id.* at 53-54 (citing PIERRE VAN PAASSEN, *TO NUMBER OUR DAYS* (1964)).

144. See UNDERWOOD & FORTUNE, *supra* note 87, on the "art" of blockading witnesses, and the ethics of contacting the opposing party's experts.

Governor Slaton of his findings and his misgivings regarding Frank's conviction during the pardon process.¹⁴⁵

The defense was not incompetent. The cross-examination of Conley was well-planned. The defense followed all the "rules." They started slow, and tried to move to a big ending. Perhaps the lawyers did not exploit some lines that have been suggested, after the fact, by the many "Monday-morning quarterbacks." Whatever the reasons, their efforts to destroy the false witness failed. Frank's efforts to present character evidence simply invited more perjured rebuttal testimony suggesting that he was some kind of pervert. The theme of perversion was actually Dorsey's invention. This was only one of the obvious prejudices that brushed reason aside, swept into the courtroom, and carried Dorsey to victory.

As to the deal mentioned earlier—Conley was given a year as an accessory after the fact. This had the effect of ensuring that he could never be charged and tried for the murder of Mary Phagan. Among the tantalizing ironies in the case was the fact that the community condemned Frank, a white man, on the testimony of Jim Conley, a black man. According to Harry Golden, "until the mid-1960s . . . no white man in any of the old Confederate States [except Frank] had ever been convicted of a capital offense on the testimony of a Negro."¹⁴⁶ The mob was undoubtedly fired up by the fact that the killing took place on Confederate Memorial Day. Frank was a "Yankee Jew," and as a result of some twisted logic, Mary Phagan's grave bears a Confederate marker. But "[t]here were Jews in Atlanta before there was an Atlanta."¹⁴⁷ Poor Moses Frank, Leo's uncle, the majority shareholder in the family's Atlanta pencil operation, and the man who brought Leo from New York City (Leo was born in Texas, by the way) to run the factory, was himself a Confederate War Veteran. He had served in Lee's army.¹⁴⁸

Another interesting aspect of the case was the confession of Conley to his court-appointed defense lawyer, William Smith, and the question of attorney-client privilege. It seems that Smith told Trial Judge Roan of the confession—supposedly after Frank had been convicted. It is believed that Judge Roan informed Governor Slaton of it, and that it figured into Slaton's decision to save Frank from the executioner.¹⁴⁹

There is some evidence that Judge Roan had made up his mind as to Frank's innocence even before he charged the jury. Lawyer Arthur Powell (later to become a judge of the Court of Appeals) had been asked by the judge to help him research several points of law during the case, and Roan had told him that Frank's

145. GOLDEN, *supra* note 125, at 202-04.

146. *Id.* at xv.

147. *Id.* at 225; FREY & THOMPSON FREY, *supra* note 126, at 21.

148. FREY & THOMPSON FREY, *supra* note 126, at 107 n.4.

149. GOLDEN, *supra* note 125, at 257-58; FREY & THOMPSON-FREY, *supra* note 126 at 154; ARTHUR G. POWELL, I CAN GO HOME AGAIN 291 (1943); *see also* HENSEN, *supra* note 135.

"innocence [was] proved to mathematical certainty."¹⁵⁰ Perhaps he was referring to the prosecution's implausible "time line," but it's hard to resist asking "What did he know, and when did he know it?" Lawyer Allen Lumpkin Henson left a memoir reporting that Smith told Judge Roan about Conley's guilt before the motion for a new trial had been ruled on, and that the jurist decided to deny the motion anyway, let things cool down, pass the information on to the Governor, and rely upon the pardoning authority to see that justice was done.¹⁵¹ For his part, Powell later stated in his autobiographical work that he too had learned who the real killer was, and that it was not Frank, but that he had learned of this from a privileged source—he seemed to imply that he learned it from a client.¹⁵² He hinted that he would write it all up in a sealed memorandum, which would be opened "after certain deaths occur . . ."¹⁵³ He repeated the story in a somewhat defensive article styled "Privilege Of Counsel And Confidential Communications," which appeared in the Georgia Bar Journal in 1944. In this piece Powell took special care to note that he had not learned who the guilty man was until after the Frank conviction had been affirmed—but before Frank was lynched.¹⁵⁴ It has been reported that up to the point of the lynching, at least, the burden of possessing such information had been "eased" by the commutation of the sentence to life imprisonment.¹⁵⁵ What about poor Frank?!

One other person carried a considerable burden through the years. Alonzo Mann, the factory "office boy" had been at the pencil factory on the day of the murder and had seen Conley carrying the body of Mary Phagan on the first floor toward the ladder to the basement. Conley had threatened to kill him if he said anything. He told his mother, and she made sure that he kept quiet. Mann broke his silence in 1983, and passed a lie detector test. His story was featured in a book about the crime.¹⁵⁶

Frank's prosecutor, Hugh Dorsey, went on to become Governor, and later served as Circuit Judge of Fulton County.¹⁵⁷ The trial wore out old Judge Roan.

150. POWELL, *supra* note 149, at 288.

151. HENSEN, *supra* note 135, at 65-66.

152. *Id.* at 66. Hensen reports that Judge Roan and Judge Foster (a friend of Hensen's family) discussed the Smith revelations with Powell, and all agreed that Frank's best hope lay with governor Slaton. *Id.*

153. POWELL, *supra* note 149, at 291-92. Apparently Powell did write the memorandum, but it was destroyed by one of his law partners after his death. GOLDEN, *supra* note 125, at 255-56.

154. 6 GA. BAR J. 333 (1944).

155. ANDREW KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 213 (2d ed. 1984).

156. FREY & THOMPSON-FREY, *supra* note 126.

157. HENSEN, *supra* note 135, at 76. Hensen takes up for Dorsey, taking the position that he was just doing his duty and that he never knew of Conley's guilt. *Id.* This is hard to swallow.

Not very long after the Frank case reached its sorry ending Judge Roan died in a sanitarium.¹⁵⁸

The Frank case has been called the American "Dreyfus Case," the problem with the analogy being that Dreyfus lived to be exonerated. Leo Frank was finally "pardoned" by the State of Georgia in 1986.¹⁵⁹ Alas, Alonzo Mann did not live to see it. He died on March 18, 1985.

IX. THE FRAMING OF "FATTY" ARBUCKLE

*Roscoe was admonished by his mother to stay away from the theater.
She warned him that nothing but trouble would come from that type of
life.*

*Andy Edmonds*¹⁶⁰

He should have listened to his mother. Hollywood was awash in sex, booze, and cocaine—Hollywood in the 1920s, in the days of Prohibition that is! It was a scandal, and decent society was going to do something about it! And this worried the Hollywood studio owners and executives. So they decided to bring in politico Will Hays to "clean up the problem (or at least make it appear that they were getting the problem under control) . . . [and] . . . establish a code of conduct for the industry and keep close watch on the moral standards of its output."¹⁶¹ Later they would regret making Hays the "Czar of the Movies" and the chief of moviedoms Oskana, the Motion Picture Producers and Distributors of America (MPPDA). Roscoe "Fatty" Arbuckle came to regret their decision too, but we are getting too far ahead.

We have to begin with Roscoe "Fatty" Arbuckle's success as a movie comedian. By September 5, 1921, "Fatty" had gotten to be more popular than Charlie Chaplin, and, on paper, he had become the highest-paid star of his day. But in the process, he had made an enemy of movie kingpin Adolph Zucker. Zucker wanted to control Arbuckle, just as he wanted to control everyone and everything else in the "Industry." From Zucker's point of view, "Fatty" had gotten too big for his britches; and it appears from the evidence that is now available that Zucker contrived a plot to bring Arbuckle down (or tighten him

158. POWELL, *supra* note 149, at 289.

159. On the details of the pardon see FREY & THOMPSON FREY, *supra* note 126; see BRIAN JACKSON, *THE BLACK FLAG* 170 (1981) (noting that pardons became stylish in the 1970s and 1980s—Sacco and Vanzetti received theirs in a Proclamation by Massachusetts Governor Michael Dukakis, August 23, 1977).

160. ANDY EDMONDS, *FRAME-UP: THE UNTOLD STORY OF ROSCOE "FATTY" ARBUCKLE* (1991).

161. *Id.* at 146.

up?) a few notches by setting him up in a compromising position. It would also appear that he enlisted Arbuckle's friend Fred Fischback to aid in the plot.

The alcoholic Arbuckle had been having a rough time of it insofar as his personal life was concerned, and when he got a new \$3,000,000 contract with Zucker's Paramount, he was easily persuaded to drive up the coast to San Francisco to host a celebration party in the St. Francis Hotel. Fischback, apparently a "stooge" for Zucker, helped arrange for the booze, in violation of the Volstead Act; and, for a nice touch, he invited a friend who was a "nightgown" salesman! Most importantly, he helped arrange for the attendance of Mrs. "Bambina" Maude Delmont and Virginia Rappe. Delmont was a major villainess, with a long record. She was known to be a "professional correspondent: a woman hired to provide compromising pictures to use in divorce cases for more unscrupulous purposes such as blackmail."¹⁶² She was also a well known liar. Virginia Rappe (an interesting name in light of what was to unfold) was a sometime actress; she was notoriously free with the men, and was rumored to be a sometime prostitute. The evidence shows that one of the reasons Virginia came to San Francisco was so that she could obtain an abortion from Dr. Melville Rumwell, who plied his illegal trade at the Wakefield Sanitarium. Delmont had apparently fronted the money for the abortion, and Virginia Rappe owed her. The abortionist could not have missed the fact that Rappe was badly infected with gonorrhea, but he seems to have taken no precautions, nor did he treat the condition.¹⁶³ Rappe was a ticking bomb. Whatever happened at the party, this much is clear: Rappe got drunk, became hysterical, and began to run around tearing off her clothes. She went into the bathroom, vomiting, and in pain. Roscoe helped her into the bedroom. On and off, she continued her hysterics. She may have said something like "What did he do to me." She may or may not have been referring to Arbuckle. According to Andy Edmonds, who has researched the case most thoroughly, Roscoe may have accidentally hit her in the abdomen with his knee when she was fooling around with him, and tickling him. Something like this apparently happened before she went into the bathroom. In any event, Rappe got progressively worse.

By the time the hotel physician arrived, sedated Rappe, and began asking questions, Delmont had started to spin her first version of a tale that she would repeat numerous times to members of the local press. The gist of the tale was that "Fatty" had lusted after Rappe for some time, that the party had provided him with an opportunity to ravish her, that he had dragged her into the bedroom of his suite and raped her, and had thereby caused the injuries (a ruptured bladder and peritonitis) that led to her death.

Maude Delmont was the false witness in this case. As in the Leo Frank and Mooney cases, the prosecutor was a more than willing partner in crime—a sponsor and coach for the perjured witness. One will recall the antics of

162. *Id.* at 155.

163. *Id.* at 171.

prosecutor Charles Fickert in the *Mooney* case.¹⁶⁴ What goes around comes around, and in 1919, Matthew Brady defeated Fickert in the election for district attorney. Brady is described as a "self-serving . . . arrogant . . . [and] ruthless man with blind ambition."¹⁶⁵ His sights, too, were set on the governorship, and his platform was going to be the rather substantial body of "Fatty." What was different about this case was the degree of Brady's recklessness and the fact that the most destructive of his false witnesses was kept off the stand in three successive trials!

From the start it should have been obvious that Delmont's tale did not jibe with the physical evidence or the testimony of other witnesses. And each time she told her story the facts changed. At some point, Delmont and her confederates had appropriated and destroyed key evidence, Rappe's clothing. They may have wanted to use the clothes in a scheme to blackmail Arbuckle; but now the clothes were gone.¹⁶⁶ This was powerful evidence discrediting Delmont. No problem. Brady was not deterred. He had two other women besides Delmont, Alice Blake and Zey Prevon, who had offered similar stories—at least to the extent that they put Arbuckle in the bedroom with Rappe shortly before she began screaming. Well, not exactly. At various points in the saga Zey Prevon refused to sign statements that had been elicited by the police, and changed her testimony. It seems that both she and Alice Blake were "browbeaten" by the D.A.. Brady kept bringing them back into line by threatening them with prosecution for perjury if they did not follow the prosecution's script.¹⁶⁷ Brady managed to move the case through a coroner's inquest and grand jury proceedings without using his big gun, Maude Delmont. He also persisted in treating the case as a "murder" case, although the grand jury's indictment only charged manslaughter. How he hoped to prevail in adversary proceedings in a real trial is the \$64,000 question.

At the preliminary hearing, the defense was able to bring up the subjects of blackmail and evidence tampering. But Brady only had to cross the threshold of probable cause, and he relied on Blake and Prevon to parrot their well-rehearsed catechism. He successfully maneuvered to keep Delmont off the stand. The case was bound over for trial.¹⁶⁸

164. The Mooney case is discussed in Chapter 6 of my proposed book (unpublished manuscript, on file with the author). See generally CURT GENTRY, *FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS* (1967); Ed Cray, *It was lies, all lies*, CAL. LAW., Sept. 1983, at 42 (claiming the villain of the case was an ambitious prosecutor Charles Marron Fickert); *Mooney v. Holohan*, 294 U.S. 103 (1935) (giving Mooney no real relief, but announcing the seemingly obvious proposition that "a criminal conviction procured by the state [or federal] prosecuting authority solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law . . .").

165. EDMONDS, *supra* note 160, at 195.

166. *Id.* at 179.

167. *Id.* at 191, 196.

168. *Id.* at 195-96.

When Arbuckle went looking for trial counsel, he went to Earl Rogers.¹⁶⁹ As usual, the great lawyer quickly and expertly sized up the situation (pun intended). "Arbuckle's weight will damn him. He is charged with an attack on a girl, which resulted in her death. He will no longer be the jolly, good-natured fat man that everybody loved. He will become a monster."¹⁷⁰ By this time Rogers was in poor health, and "Fatty" ended up hiring a team of five respected lawyers, the so-called "million-dollar defense team"¹⁷¹—in today's argot, a "dream team."

But this "dream team" was going to have its hands full. The prosecutor continued to control the witnesses while he riled up the third and fourth estates. The forces of feminism were rallied against the defendant. "[W]omen's groups . . . demand[ed] [Arbuckle's] lynching".¹⁷² It is reported that during Fatty's third trial, when the defense finally decided that it was necessary to be explicit about Virginia Rappe's history of alcohol abuse, prostitution, abortion and venereal disease, women in the courtroom protested and "stamped their feet to drown out the 'vulgarity.'"¹⁷³ As for the press, the Hearst papers were the worst of the lot. Indeed, the most vicious rumor associated with the Arbuckle case appeared in the Hearst papers and nowhere else—not in any transcript, police report, witness statement, or interview. The rumor was that "Fatty" had raped Virginia Rappe with a Coke bottle or a champagne bottle, and that when the police arrived, he had thrown the bottle out the window while opining "there goes the evidence."¹⁷⁴

In preparation for the first trial, and during jury selection, the prosecutor periodically kept his witnesses in involuntary "protective custody" (sometimes under a slightly more permissive "protective surveillance") to keep the defense away from them.¹⁷⁵ And in a spectacular, unbelievably arrogant play, Brady locked Delmont up on bigamy charges, and refused to let her out to testify!

The first trial was a string of disasters for the prosecution. One of the prosecution witnesses, a Betty Campbell, was turned around under defense cross-examination. She began to give testimony that favored the defendant—he had not been drunk or threatening at any time. Indeed he had appeared casual at all times. What's more, she testified that Brady had threatened to jail her if she did not testify against Arbuckle.¹⁷⁶ Things then went from bad to worse for the prosecution. Zey Prevon testified to her "captivity" at the hands of the District

169. See ADELA ROGERS ST. JOHNS, FINAL VERDICT (1962) (discussing Rogers).

170. EDMONDS, *supra* note 160, at 211.

171. *Id.* at 513.

172. *Id.* at 181.

173. *Id.* at 247; see also MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS: A MODERN ENQUIRY INTO THE SALEM WITCH TRIALS 161 (1961). One is reminded of the scene at the famous New England witch trials: "Long ago [the Magistrates] had discovered as a kind of unwritten rule of evidence that the girls could be used as a kind of judiciary barometer; let any degree of false pity creep into the administration of justice and the girls were tormented." *Id.* Nowadays we have television.

174. EDMONDS, *supra* note 160, at 243.

175. *Id.* at 214, 220.

176. *Id.* at 222.

Attorney, and his efforts to force her to make statements that were not true.¹⁷⁷ Alice Blake did the same.¹⁷⁸

The prosecution tried to recover by playing a big card, calling a "fingerprint expert" to testify that he had examined the doors of the bedroom where the rape had allegedly taken place, and had found evidence that Arbuckle's prints were superimposed over Rappe's—this supposedly showed that she had been struggling to open the door while he forced it closed. This was countered with evidence suggesting that the fingerprints had been faked. Then came the medical witnesses, who more or less supported the defense theory of the case that Rappe's bladder probably ruptured as a result of its diseased condition. Even the insidious Dr. Rumwell was helpful!¹⁷⁹ Finally, a number of witnesses testified as to Rappe's past wild behavior—particularly her tendency to get drunk easily, rip off her clothes, and run naked through the streets.¹⁸⁰ Brady brought several of these witnesses up on perjury charges, but dropped the charges, although in one case he pushed the matter to trial and a hung jury. The case limped on to an inconclusive end. The jury was hung, ten votes for acquittal and two votes against. There were rumors that one juror was in cahoots with the District Attorney.

The second trial was equally disgraceful. Blake and Prevon were ineffective, and Brady got them off the stand as quickly as he could. Even the prosecutor's fingerprint expert turned on him, agreeing that the prints on the bedroom door might have been phoneyed-up. But the defense failed to take the prosecution up on an offer to call Delmont to the stand, and did not call the defendant. Another hung jury—but this time ten to two for conviction!¹⁸¹

A third trial was ordered, and this time the defense mounted an all-out attack on Rappe's character, which scandalized the genteel. The prosecution was finally whipped. The jury reportedly took less than five minutes to deliberate and return a "not guilty" verdict, and the jury went further and made a statement expressing their collective outrage at the injustice that had been done to Roscoe Arbuckle.¹⁸² Some might be inclined to hold this victory up as a testament to the good sense of jurors and a monument to the power of confrontation and cross-examination. But the reader would do well to remember that the legal system subjected "Fatty" to three trials. And although the government settled for a small fine on the Volstead Act charges, the IRS swooped in and stuck it to him for \$100,000 in back taxes. The movie moguls blacklisted him. His career was ruined, and he was left a bankrupt. All this at the hands of a prosecutor who knowingly used

177. *Id.* at 223.

178. *Id.* at 225.

179. EDMONDS, *supra* note 160, at 227. At one point in the trial, the prosecutor entered into evidence what was left of Rappe's bladder for whatever shock effect it might have. Cf. SEYMOUR WISHMAN, *ANATOMY OF A JURY* 164 (1987) (discussing the entry into evidence of a murder victims' fingernails, each in its own plastic tube). *Id.*

180. EDMONDS, *supra* note 160, at 227-28.

181. *Id.* at 246.

182. *Id.* at 247.

false evidence, who suborned perjury, who barricaded, blockaded, and intimidated witnesses, who manipulated the press to his advantage, and who may have engaged in jury tampering not to mention evidence tampering. According to the most thorough student of the case, Brady received at least two \$10,000 checks from movie mogul Zuckor during the course of Roscoe's trials.¹⁸³

Roscoe "Fatty" Arbuckle tried to make a comeback, and some say he would have made it back to the top; but he died in his sleep, of a heart attack, on June 29, 1933. His old pal Buster Keaton said that "Fatty" (like Queen Caroline) died of a broken heart. In this case (if not Queen Caroline's) the comment was anatomically on the mark, at least. Indeed, the cliché was probably right on.

X. THE NEVER-ENDING STORY OF ALGER HISS

"A handful of Administration apologists, who find themselves unable to defend Judge Kaufman's conduct in the [first] Hiss case on the facts, are attempting to turn the case into a political issue, which it is not."

*Richard M. Nixon*¹⁸⁴

Mr. Nixon's complaint¹⁸⁵ has been described as "one of the more amusing public utterances of a career that has not been marked by wit."¹⁸⁶ The Hiss case propelled Nixon to the Vice Presidency—"[h]e was Bolingbroke to Richard the II, his bucket dancing in the air as Hiss's sunk down and down."¹⁸⁷

It is still in vogue to condemn Mr. Nixon, for almost anything.¹⁸⁸ One can just as easily make the case that Congress is a poor forum for adjudication;¹⁸⁹ and

183. *Id.* at 215-16, 253.

184. C.P. Trussel, *House Group Decides Not to Hear Witnesses Barred at Hiss Trial*, N.Y. TIMES, July 13, 1949, at 19.

185. As a Nixon biographer points out, "[p]olitics were closely woven into the entire fabric of the Hiss case." STEPHEN AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN VOLUME 1 1913-1962* (1987); see also ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* 447, 469 (1978). Nixon's comments were made after Hiss's first trial, which ended in a hung jury. Nixon and other critics denounced Judge Kaufman's rulings excluding prosecution evidence (much of which was admitted in the second trial), as well as his action in stepping down from the bench to greet Supreme Court Justices Reed and Frankfurter. These Justices had taken the unprecedented step of testifying as character witnesses for Hiss. *Id.*

186. WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* 296 (1968).

187. *Id.* at 271.

188. Former President Nixon died on April 22, 1994, as this was being written.

189. Liberals and Conservatives have taken turns sounding the alarm, depending on whose ox was being gored at any particular time. See ALAN BARTH, *GOVERNMENT BY*

almost as easily the case that the crime of perjury has been and will continue to be used or abused for political ends—against witnesses “set up” in Congressional hearings or before grand juries. Walter Goodman described the logic and style of a committee investigation in his history of HUAC (House Un-American Activities Commission), and his description looks eerily familiar in the 1980s and 1990s:

The exigencies of ordinary politics [have since the earliest days of the Republic] often led legislators to peep into odd corners of the executive establishment and elsewhere, and there was no requirement that they produce a law to justify the time and money they spent; the public enlightenment that presumably attended their revelations together with the possibility that a law might actually emerge at some future time or other was justification enough. Unrestricted, for practical purposes, as to the subject matter of their inquiries or the manner in which these were conducted, uncommitted to tangible results, each committee chairman might allow his inclinations generous sway.¹⁹⁰

Then as now, committee hearings began with lengthy assurances that fairness would prevail;¹⁹¹ but witnesses knew that anyone who declined to comply with a

INVESTIGATION (1955); ERIC FELTEN, *THE RULING CLASS: INSIDE THE IMPERIAL CONGRESS* (1993); *see also* GOODMAN, *supra* note 186, at 4-5. Goodman notes that when in the 1920s the “nation’s moneyed interests were the defendants in nearly all of these inquests . . . the hearings were attacked by conservatives as Star Chamber proceedings and defended by liberals as legitimate expressions of the people’s right to know.” *Id.* While Andrew Mellon protested that “government by investigation is not government,” Felix Frankfurter assured the readers of “The New Republic” that the “power of investigation should be left untrammelled,” and bounded only by, in Goodman’s words, the willingness of, “[C]ongress itself, . . . the press, and . . . the good sense of the [P]eople to keep this large power from degenerating into partisan advantage. . . . Nearly thirty years later, when Senator McCarthy was abroad in the land, Mr. Justice Frankfurter would raise his voice in concern over the use of the power he had once championed.” *Id.* at 4-5.

Woodrow Wilson, the *real* father of big government, went so far as to suggest that “the informing function of Congress should even be preferred to its legislative function.” WOODROW WILSON, *CONGRESSIONAL GOVERNMENT; A STUDY IN AMERICAN POLITICS* 203 (1900). If this be true, why does the Constitution refer to it as the Legislative branch? Why not the Inquisitive branch? In support of the proposition that Wilson was the real father of big government *see, e.g.*, BRUCE PORTER, *WAR AND THE RISE OF THE STATE* 269-75 (1994).

190. GOODMAN, *supra* note 186, at 4; AMBROSE, *supra* note 185, at 235. In 1951, Nixon made a big point of defending Congress’ right to obtain information originating in the Executive branch of government! *Id.* This is another “Watergate” irony.

191. *See* GOODMAN, *supra* note 186, at 26-27. Just prior to the opening of hearings held by the 1938 Dies Committee, Chairman Dies read into the record a lengthy set of ground rules assuring witnesses that they would be treated fairly, and guaranteeing that reputations would not be “smeared.” *Id.* According to Goodman,

direction of the committee did so at his or her peril. Committees could indict individuals or organizations in advance of, or without the benefit of, any real "hearing" by outright "leaks" or the release of a "preliminary report" to the full committee from a so-called subcommittee or individual member.¹⁹² The hearing commissioners did not honor courtroom rules of evidence—"[t]hey neither restrain[ed] the prosecutor nor shield[ed] the defendant."¹⁹³ Contrary to popular belief, it was not the assertion of the Fifth Amendment privilege that bothered the members of this most notorious of congressional investigating committees.¹⁹⁴ Although they may have given the impression that it did, they reserved their real rancor for the attorney-client privilege and the attorney-client relationship in general. Committee members did not (and to this day do not) like to have witnesses consulting with lawyers.¹⁹⁵ Nor did they want them insisting on technicalities. In a manner now familiar to consumers of television hearings, committee members gave friendly witnesses free reign to say pretty much what they liked,¹⁹⁶ and, cued by leading questions, invited them to give all manner of opinions.¹⁹⁷

In spite of all this, it is still hard for some to have much sympathy for Alger Hiss. There was the evidence, which has, so far, stood the test of time as well as a relentless pounding;¹⁹⁸ and there was also what has been referred to as Hiss's

"[i]n the days that followed, observers began to wonder whether the lady of breeding who had made such a dignified entrance into town was in fact setting up a bawdy house." *Id.*; see also ANTHONY FLEW, THINKING STRAIGHT 25-26 (1977). Flew, a certified logician and professional thinking person, reports that the committee was nicknamed the "Un-American Fallacy" in that it specialized in the fallacy of the "divided middle." That is to say, the members of the HUAC [hereinafter House Un-American Activities Commission] "were inclined to deduce that a person must be a Communist from the evidence that he possessed some characteristic perhaps possessed by all Communists, but certainly not in fact peculiar to them." *Id.*

192. GOODMAN, *supra* note 186, at 231.

193. *Id.* at 13.

194. GOODMAN, *supra* note 186, at 250-51. The HUAC, in particular, liked witnesses to take the Fifth, so that the Committee could capitalize on the publicity value of its invocation. As Nixon stated, "It is pretty clear, I think, that you are not using the defense of the Fifth Amendment because you are innocent." Ironically, when HUAC Chairman Parnell Thomas was called before a grand jury on charges of payroll padding (he was convicted) he took the Fifth! *Id.*

195. *Id.* at 251.

196. *Id.* at 197.

197. *Id.* at 209. For criticism of the practice of putting leading questions to friendly witnesses in the guise of cross-examination, during a recent Senate hearing, see TIMOTHY PHELPS & HELEN WINTERNITZ, CAPITOL GAMES 335, 338 (1992) (the examinations of the witnesses were "more a series of small speeches punctuated with symbolic queries such as 'Don't you think Judge'").

198. See WEINSTEIN, *supra* note 185. In this widely acclaimed study of the case, Weinstein makes the point that Hiss was convicted of perjury, not espionage, and that the evidence shows that "he did in fact perjure himself when describing his secret dealings with Chambers." See also Irving Younger, *Was Alger Hiss Guilty?*,

"careerism," the most probable motive for his conduct throughout the affair. He was not just the darling of the "liberal media." He thought pretty highly of himself, and in answering his accusers he frequently resorted to references to his status and connections. "I too have had a not insignificant role in the magnificent achievements of our nation in recent times."¹⁹⁹ In the context of proceedings popularly known for reliance on "guilt by association," Hiss, at times, seemed to rely on a defense of "innocence by association."²⁰⁰

Hiss was not the most pitiable of the victims claimed by HUAC. That dubious distinction almost certainly belonged to William Remington, a young Commerce Department official whom Elizabeth Bentley, the "nutmeg Mata Hari" who kicked off the whole Hiss mess, accused of having been, at one time, a member of a Communist "ring." This triggered inquiries and investigations. When she was goaded into repeating her allegations in a non-privileged forum—on "Meet the Press"—Remington's lawyer prodded him to sue for libel, a step that many have lived to regret taking (Hiss included).²⁰¹ To Bentley's consternation, the sponsor of the program caved in and settled with Remington.²⁰² But Remington's minor victory only fueled the fire. Bentley's lawyer²⁰³ relentlessly pursued the matter and turned up evidence which he

COMMENTARY, Aug. 1975 at 23-37; JOHN CHABOT SMITH, ALGER HISS: THE TRUE STORY (1976) (a decidedly pro-Hiss collection of conspiracy theories); PAVEL SUDOPLATOV, ET AL., SPECIAL TASKS: THE MEMOIRS OF AN UNWANTED WITNESS - A SOVIET SPYMASTER 227-29 (1994) (presenting new revelations that support Hiss's conviction). Of course, one may well harbor doubts about the credibility of any former KGB operative.

199. GOODMAN, *supra* note 186, at 258 (quoting C.P. Trussel, *Hiss, Chambers Meet Openly At House Spy Hearing Today*, N.Y. TIMES, Aug. 25, 1948, at 2).

200. *Id.* (quoting Mr. Nixon).

201. Libel suits spread the libel, and in the worst case scenario, prove the truth of it after all. For yet another illustration, I refer the reader to Lillian Hellman's suit against Mary McCarthy, which is summarized in PAUL JOHNSON, INTELLECTUALS 302-05 (1988). Oddly enough, it was the antics of the HUAC that made Lillian Hellman a legend in the first place. *Id.* at 299.

202. See GARY MAY, UN-AMERICAN ACTIVITIES: THE TRIALS OF WILLIAM REMINGTON 118 (1994).

203. *Id.* at 179, 204, 228-29. This lawyer was Godfrey P. Schmidt. According to one of Remington's lawyers, and certainly his most dogged supporter, the late Joseph Rough, Jr., "the foreman of the [first] indicting grand jury was collaborating in the preparation and publication of a book by the accusing witness, Elizabeth Bentley. Her book could only be a success if her credibility vis-à-vis Remington was resuscitated. In addition, the prosecutor before the grand jury had been Bentley's attorney." Here Rough was referring to Thomas Donegan, the prosecutor assigned to the first grand jury, who had been one of a team of lawyers representing Bentley in a lawsuit against the U.S. Shipping and Service Corporation in 1947 (he had been "hand-picked" by the FBI to represent her). *Id.* May's account also condemns Schmidt, Brunini, and Donedan. See Joseph Rough, Jr., *An Unabashed Liberal Looks At A Half-Century Of The Supreme Court*, 69 N.C. L. REV. 213, 224 (1990) (contending that conflicts of interest led to conspiracy—that Bentley and "her lawyer" forced Remington's estranged wife to give critical testimony against Remington to the grand jury); see

presented to the HUAC proving that Remington had, in fact, been something that looked very much like an active party member when he worked for the T.V.A.. Remington foolishly²⁰⁴ denied all such suggestions categorically in testimony under oath, was indicted for perjury, was tried and convicted twice (the first conviction was reversed, but the second was obtained on a new indictment that Remington had perjured himself in the first trial),²⁰⁵ and was sent to prison. There his story ends, for one or more of his Lewisburg inmates, who he caught robbing his cell, killed him.²⁰⁶

Hiss's case followed a strikingly similar pattern, but his story did not end with his sentence or incarceration. Media interest in his trials and tribulations continues to this day.

Once again, there were Elizabeth Bentley's allegations. It seems that the politically hard-pressed Committee got wind of the fact (from a Father Cronin, who told Nixon) that a senior editor at Time magazine had been a Communist courier at one time, and that he might corroborate at least parts of Bentley's story. In characteristic Washington fashion, the Committee tipped the newspapers, and then subpoenaed Chambers.

Unlike Hiss, Chambers was not physically impressive. He was dumpy, and his clothes were unpressed. His speech was somewhat monotone. On the other

MAY, *supra* note 202, at 155, 157-58, 179, 298-99. But as May observes, "Such misconduct, however, does not excuse Remington's own illogical behavior." *Id.* at 179.

204. In order to understand the political leanings of ivy-leaguers like Hiss and Remington, we might consider the following observations regarding the political leanings of many young college men in Elizabethan England.

This passage is from NICHOLL, *supra* note 20, at 95:

For a young intellectual at Cambridge, there was something potent and seductive about Catholicism. To become a Catholic, or to voice sympathies in that direction, was a gesture of defiance and dissent. It appealed in particular to those students who deplored the spread of Puritanism in the university. There was a polarity between the forbidden, atmospheric aura of Catholicism, and the 'plain, simple, sullen, young contemptuous' features of the Puritan faction now in the ascendant. Those words are John Donne's

Id.

205. MAY, *supra* note 202, at 273. The second indictment sought to sidestep the problems associated with the manner in which the first indictment had been obtained, and to avoid the difficulty of defining "Party Membership," a seemingly fatal flaw in the first indictment. This maneuver was the brainchild of the cunning and insidious Roy Cohn. *Id.*; see Bennett Gershman, *The New Prosecutors*, 53 PITT. L. REV. 393 (1993) (discussing abusive grand jury tactics).

206. WEINSTEIN, *supra* note 185 at 6-7; MAY, *supra* note 202. The fatal blow was struck with a brick slung in a sock, wielded by George McCoy, a moron with an IQ of 61. McCoy had made anti-Communist statements, and May argues that the government "covered-up" the true motives of the killer or killers to stifle curiosity and avoid embarrassment and possible litigation. *Id.*

hand, he had prepared himself well, and was highly intelligent. Appearances are deceiving, and clothes do not, in fact, make the man. Chambers was a true intellectual who had translated numerous works from the German, including, of all things, *Bambi*. He made \$25,000 a year, which was \$10,000 more than Congressman Richard Nixon was paid.²⁰⁷ In a dramatic opening statement, Chambers named Hiss as being one of eight government officials whom he claimed were his Communist associates in the mid-thirties. Curiously, Chambers stressed at several points during his testimony that the purpose of the ring was infiltration and not espionage.²⁰⁸ Even so, if Chambers were believed, one alleged borer had gotten pretty far up the stem:

Hiss stood out sharply from the other members of the Washington Communist group whom Chambers named in his introductory statement to the Committee—rather like a Man of Distinction on a stroll through the C.C.N.Y. campus. . . . They went their separate ways, with Hiss embarking in 1936 on the most sedate way of all, a career in the State Department which would include an organizing role in the Dumbarton Oaks Conference, the Yalta Conference, and the meeting in San Francisco where the U.N. Charter was adopted. In 1947 he accepted the presidency of the Carnegie Endowment for International Peace.²⁰⁹

Would Hiss refute these charges? Surely Hiss would be believed if the case degenerated into a swearing contest. Could any "hard" evidence be found at this late date? The big question was whether Chambers was believable. Of the credibility of the key players in this drama Walter Goodman offered this assessment:

Hiss . . . presented himself as the victim of a reactionary plot Even after his case was decided, after he had served his time in prison, he concluded his singularly unpersuasive account [along those lines]. . . . [As for Chambers, he] was a truthful man, who on certain subjects could not quite separate the real from the fantastic. . . . This pudgy figure in a dark suit wanted everyone to understand that he harboured the conscience of a Raskolnikov and the mission of Jesus Christ. . . .²¹⁰

Chambers was peculiar in another way. "Chambers was a man who would answer all questions but volunteer nothing."²¹¹ There would always be more to come.

207. AMBROSE, *supra* note 185, at 175.

208. GOODMAN, *supra* note 186, at 286-87; WEINSTEIN, *supra* note 185 at 527.

209. GOODMAN, *supra* note 186, at 253-54.

210. *Id.* at 260-61.

211. AMBROSE, *supra* note 185, at 179 (quoting Bert Andrews, Nixon confidant and chief Washington correspondent of the New York Herald Tribune).

Most of the folks named by Bentley and Chambers responded to further Committee inquiry by chanting the Fifth Amendment. Hiss did not. He immediately telegraphed the HUAC and demanded an opportunity to testify and refute the charges. This first time around (August 5, 1948), the poised and high-toned Hiss wowed most of the members of the Committee. But the secretive Nixon knew more than he was letting on;²¹² and, after all, it takes one to know one.

[W]hat Nixon showed when reacting to Hiss's testimony, which bowled over his colleagues, was an ear for the ring of equivocation. Asked by Stripling whether he had ever seen Whittaker Chambers, Hiss replied: "The name means absolutely nothing to me . . ." While under oath, he had avoided a categorical statement that he did not know his accuser.²¹³

Hiss was cagier than poor Remington. Like the cagiest expert witness, he qualified all his answers "to the best of [his] recollection."²¹⁴ Some on the committee wanted to drop the matter. Nixon persisted, pointing out that it was not necessary to prove that Hiss was a Communist or a spy, but only that he had lied under oath by denying that he knew Chambers. Still, it would take some maneuvering to trap him, and some details—something more concrete.

Chambers supplied this and more, but not all at once. He recalled staying with Hiss and his wife, borrowing money from them, recalled many personal details about them, and so forth. Hiss had given an old Ford "to the Communist Party," and Chambers used it. He remembered that the Hiss's were bird watchers, and that they once excitedly told him that they saw a prothonotary warbler. This was pretty good stuff, and Nixon used it to good effect when Hiss next appeared before the committee (August 16, 1948). Surprised by Nixon's detailed knowledge of his life during the relevant period, the hard pressed Hiss offered that he might have known Chambers under the name of George Crosley, a writer he barely knew. Nixon hit him with the matter of the Ford. Hiss admitted that he had "loaned" it to this man he barely knew. Yes, he was a bird watcher, and yes, he saw a prothonotary warbler on the Potomac. Then the committee ordered both men before it for a confrontation (August 17, 1948). Hiss went through a great show, listening to Chambers' voice, and even examining his teeth, before identifying him as Crosley. No one else, no one other than Hiss's wife that is, would ever remember a Crosley, or identify Chambers with that name—although Chambers did say that Hiss had known him as "Carl." In contrast, Chambers was quite positive in his identification of Hiss as a Communist and a member of Chambers' old ring. Hiss then dared Chambers to make his accusations in a non-privileged forum. The questioning continued. Hiss admitted knowing Chambers

212. WEINSTEIN, *supra* note 185 at 7-8.

213. GOODMAN, *supra* note 186, at 255-56.

214. AMBROSE, *supra* note 185, at 172; *see also* Underwood, *Logic*, *supra* note 30, at 187 (discussing "qualifiers").

albeit under the name of "Crosley." But he continued, not very persuasively, to minimize his relationship with "Crosley." He said he had sublet his apartment to Crosley, and let him use the old Ford as part of the deal. Finally, he insisted that he had not seen him since 1935.²¹⁵

The committee scheduled another hearing and confrontation (August 25, 1948). At this hearing the committee presented Hiss with a transfer certificate which bore Hiss's signature, and which transferred title to the Ford to a Communist Party member, just as Chambers had said. Hiss equivocated. He would be "surer" as to whether it was his signature if he could see the original. Before this hearing, the press had generally sided with Hiss. A whisper campaign against Chambers had also taken its toll. He was insane, a homosexual, and so on. Now the tide was turning. Chambers appeared on "Meet the Press" (then a radio show), repeated his accusations, and stated that he did not think Hiss would sue. Three weeks passed, and even the Washington Post became exasperated—"Mr. Hiss has created a situation in which he is obliged to put up or shut up. Mr. Hiss has left himself no alternative."²¹⁶ Events, and other people, were driving both Hiss and Chambers to a terrible end. Hiss sued in Baltimore, which was his home town. His lawyer was William Marbury, a descendant of the Marbury of *Marbury v. Madison* fame.²¹⁷

Now the case took a very odd turn. Hiss's own lawyer asked Chambers a rather obvious (but so far unasked?) question. Did Chambers have any documentary evidence to back up his story? Chambers turned over sixty documents to Marbury and to the Justice Department, and identified them as State Department documents stolen by Hiss. He said Hiss turned them over to him [Chambers], and that he [Chambers] had passed them on to the Russians. Does this development suggest that Nixon and his crew had not been so thorough after all, and that Chambers was playing by his own script? One wonders what it signaled to Marbury. What was Hiss not telling him? What else was Chambers holding back? On the other hand, Chambers had been a bit too clever for his own good. He had already testified that Hiss had not been involved in espionage. Now that looked like outright perjury, as plain as day. If the Justice Department wanted to hammer him, or from a partisan perspective, silence him, Chambers had given them the ammunition. A furious Nixon confronted Chambers, and learned that he had something else stashed away. Nixon's associates convinced him to subpoena anything Chambers had, to be on the safe side. Nixon left, somewhat disgusted, for a vacation cruise. While he was gone, HUAC staff members served the subpoena, and Chambers led them to the now famous (infamous?) "pumpkin patch." A hollowed-out pumpkin contained rolls of microfilm of more State Department documents. Nixon returned from his aborted vacation.

215. GOODMAN, *supra* note 186, at 256-58; AMBROSE, *supra* note 185, at 180-85.

216. GOODMAN, *supra* note 186, at 258-59; AMBROSE, *supra* note 185, at 186-87.

217. AMBROSE, *supra* note 185, at 194.

There would be more hearings. Chambers would testify as to how Hiss would sneak the originals of documents out of the State Department, have some photographed by a Communist Party member in Baltimore, and have others copied by Mrs. Hiss on her typewriter. He would pass the goods to Chambers, and return the originals to State. Chambers kept copies of everything. He said he kept them for insurance, in case the Communist Party ever threatened him. And now another player changed the course of events. J. Edgar Hoover had been cooperating with Nixon. His agents managed to track down Mrs. Hiss's Woodstock typewriter.²¹⁸ This was the tangible thing that grand jurors and petite jurors would be able to put their hands on. Psychologically, there is nothing like "real" evidence. Exemplars—Mrs. Hiss's personal correspondence—materials typed on the newly discovered Woodstock, and some of the pumpkin papers matched!

On the last day of its life, the grand jury handed down a two-count indictment. It charged that Hiss had committed perjury before the grand jury when he denied that:

[I]n or about the months of February and March, 1938, [he] furnished, delivered and transmitted to one Jay Davis Whittaker Chambers, who was not then and there a person authorized to receive the same, copies of numerous secret, confidential and restricted documents, writings, notes and other papers, the originals of which had theretofore been removed and abstracted from the . . . Department of State.²¹⁹

The indictment also charged that Hiss had lied when he told the grand jurors that he had not seen Chambers after January 1, 1937—his testimony "was untrue in that the defendant did in fact see and converse with the said Chambers in or about the months of February and March, 1938." As it was drafted, the second count overlapped the first, and together the perjury counts suggested that Hiss was engaged in espionage. But the statute of limitations had run on espionage, and as Weinstein and others have pointed out, a conviction for espionage would have been hard to obtain, especially given the "pre-war circumstances involved" (our "alliance" with the Soviets in the war against Hitler). Nevertheless, the HUAC, which Truman aides had targeted for extinction was able to point to the indictment as a vindication of its activities.²²⁰ Truman was going to regret

218. See e.g., Underwood, *Logic*, *supra* note 30, at 172. Hiss supporters have argued, unconvincingly, that the typewriter was built by the FBI. This is the so-called "forgery by typewriter" theory, another *argumentum ad ignorantiam*—anything's possible. *Id.*

219. GOODMAN, *supra* note 186, at 264.

220. WEINSTEIN, *supra* note 185, at 301; GOODMAN, *supra* note 186, at 266. On the unpopularity of the Committee see WEINSTEIN, *supra* note 185, at 4.

having passed off the HUAC hearings as a "red-herring" drummed-up by a "do-nothing Congress." Harry's bathroom was "about to fall into the Red Parlor."²²¹

The Hiss case is in our collection for a number of reasons. In the first case, Hiss's lawyers called numerous character witnesses. He had an unbelievable stock of "oath-helpers," including a number of sitting Supreme Court Justices who testified as to his good character!²²² This time it worked—it got him a hung jury. It was one of the first cases in which an expert was called to opine on the credibility of other witnesses. In the second trial Hiss's lawyers resorted to "psychoanalysts to explain, with appropriate phrases from their canon, that Chambers was a great liar."²²³ This experiment was a great disaster. Claude Cross²²⁴ put Dr. Carl Binger on the stand. Binger testified that based on his observations of Chambers during the two trials, and based on his readings of Chambers work as a translator (including Bambi) he was able to diagnose Chambers as a "psychopathic personality" who would exhibit symptoms of 'persistent and repetitive lying' . . . and a tendency to make false accusations." It all sounded pretty good while Cross was conducting the orchestra. But Prosecutor Murphy simply demolished the witness, his credentials, and his pseudoscientific methodology and opinion. One commentator asserts that "[w]hy Hiss allowed such a man [Dr. Binger] to be the bulwark of his defense is another of the infinite number of enduring mysteries of the case."²²⁵ The case also addresses a couple of questions that we have asked elsewhere in the text. Do liars always lie? Can a perjurer tell the truth—or more to the point, will jurors believe a perjurer, knowing that he or she lied in the past? Chambers initial insistence that Hiss had been involved in infiltration and not in espionage would come back to haunt him. Consider the following cross-examination by Hiss's lawyer Claude Cross (no pun intended) from the second trial of Alger Hiss.

Q: You were under oath when you testified before the House Committee, before the grand jury, and in giving your Baltimore depositions, and in the course of trial?

221. DAVID MCCULLOUGH, *TRUMAN* (1992); see also WEINSTEIN, *supra* note 185, at 470. In the four months that passed between the first and second Hiss trials "the Cold War heated up . . . Congress approved the NATO Treaty and the Marshall Plan. Truman announced . . . that the Soviet Union had exploded an atomic bomb . . . [and] Mao Tse-tung's Red Army continued taking over China's mainland." *Id.*

222. Justices Reed and Frankfurter testified in the first but not the second trial. The ABA Code of Judicial Conduct now provides that a judge "shall not testify voluntarily as a character witness," so as to avoid any appearance that his or her position is being used to advance private interests. See MODEL CODE OF JUDICIAL CONDUCT Canon 2B.

223. GOODMAN, *supra* note 186, at 261; see also discussion in Richard H. Underwood, *Truth Verifiers: From The Hot Iron To The Lie Detector*, 84 KY. L.J. 597 (1995-96) [hereinafter Underwood, *Truth Verifiers*].

224. Hiss's lawyer in the first trial had been the legendary Lloyd Paul Stryker.

225. AMBROSE, *supra* note 185, at 205.

A: That is right.

Q: Did you on or about October 14th or 15th, 1948, testify before the grand jury that indicted Mr. Hiss that you didn't have any knowledge of espionage or of anyone in the employ of the Government furnishing information?

A: I did

Q: Mr. Chambers, I am now reading from volume 7, page 3272, of the minutes of the grand jury which I understand—and I have not looked anywhere else except on this page—and which I assume was your testimony on October 14, 1948.

Q: Mr. Chambers, have you any information or knowledge from the period that you were in Washington in your underground work to the present time of any individuals in the employ of the Government furnishing information to any unauthorized sources? That is a general question and you can treat it in any way you wish.

A: I can't say that I have specific knowledge of the transfer of information. I have knowledge of certain contacts between - is that what you mean?

Q: What do you mean by contacts?

A: I know that various people were in touch with J. Peters or other Communists.

Q: Did you so testify?

A: I did.

Q: Those questions were asked you and those answers were given?

A: That is right.

Q: Did you understand the questions?

A: I did.

Q: And the answers were deliberately and intentionally made?

A: That is right.

Q: You recognize, do you not, Mr.Chambers, that the testimony is flatly contradictory to the testimony you have given to his Honor and this jury?

A: I do.

Q: It therefore follows that you lied either before the grand jury on October 14, 1948 or before his Honor and this jury, doesn't it?

A: That is right.

Q: Now, continuing on the same subject:

Q: In connection with your activities with the Communist Party were you required to or did you obtain any information from any individual or transmit it to J. Peters?

A: No, I was not and did not.

Q: On October 14, 1948, when you were under oath before the grand jury that indicted Alger Hiss, were you asked that question and did you give that answer?

A: I did.

Q: You were a God-fearing man?

A: I was.

Q: That was after you ceased to be a Communist?

A: That is right.

Q: And after your baptism in 1940, of course?

A: That is right.

Q: And after you had gone with the Quakers?

A: That is right.

Q: That too is flatly contradictory to your testimony now, is it not?

A: That is right.

Q: And you either lied then or you lied before this jury?

A: That is right

Q: This is from page 3285, Mr. Chambers

Q: Mr. Chambers, when we recessed yesterday one of the grand jurors asked you a question and I will read the testimony—'Juror: Could you give one name of anybody who, in your opinion, was positively guilty of espionage against the United States? Yes or No.'

And then your answer to that, and I am quoting: 'Let me think a moment and I will try to answer that. I don't think so but I would like to have the opportunity to answer you tomorrow more definitely. Let me think it over overnight.'

Now, that question was asked you on October 14th, wasn't it?

A: That is right.

Q: And you said, 'I do not think so but let me think it over overnight'?

A: That is right.

Q: That was October 14th?

A: I believe so.

Q: Then on October 15th you came back and then the question that had been asked by the juror on October 14th was recalled by Mr. Donegan to your attention, and then:

'So if you will proceed from there'

A: All right, I shall. I assume that espionage means in this case the turning over of secret or confidential documents.

Q: Or information - oral information.

A: Or oral information. I do not believe I do know such a name.

The Juror: If that is your answer, it satisfies me.

Were you asked those questions and did you give those answers on October 15, 1948, before the grand jury under oath in this very building?

A: I did.

Q: And that was the grand jury that indicted Alger Hiss [for perjury]?

A: That is right.

Q: And that too is flatly contradictory to your testimony given from that witness chair in this trial?

A: That is right.

Q: And you lied either then before the grand jury or before this jury?

A: That is right.²²⁶

The impeachment was complete. Moreover, a logician would point out (perhaps petulantly) that the cross-examiner successfully exploited the *argumentum tu quoque* and the *argumentum ad ignorantium*.²²⁷ These usually work pretty well. Nevertheless, when the final scores were tallied, Chambers won and Hiss lost! Such are the limits of cross-examination.²²⁸

Unlike poor Remington, Hiss was a survivor, and Hiss has been persistent, if not altogether consistent. Watergate renewed interest in his case.²²⁹ He was readmitted to the Massachusetts Bar in 1975,²³⁰ and, more recently, thanks to his most loyal supporters, was seemingly "cleared" by no less a judicial body than the New York Times. According to the Times of October 29, 1992, a Russian General Volkogonov was willing to opine that Hiss "was never a spy for the Soviet Union."²³¹

Later it was revealed that Volkogonov, whose opinion had been solicited by Hiss partisans, had not done a particularly thorough search of Soviet files after all. Indeed, Volkogonov later issued what amounted to retractions of his earlier "exonerated" of Hiss in the New York Times of December 17, 1992, and in Moscow papers of September 25 and November 24, 1992.²³² That

226. IRVING YOUNGER & MICHAEL GOLDSMITH, *PRINCIPLES OF EVIDENCE* 293-95 (1984) (containing this version of the record which I have edited slightly).

227. See Underwood, *Logic*, *supra* note 30, at 171-72.

228. "The Limits of Cross-Examination," and the techniques, are discussed in Chapter 8 of my book (unpublished manuscript, on file with the author).

229. WEINSTEIN, *supra* note 185, at 548-65.

230. In the Matter of Alger Hiss, 333 N.E.2d 429 (Mass. 1975). This was over the objection of the Bar's Board of Overseers! The court did note that "nothing we have said here should be construed as detracting one iota from the fact that in considering Hiss's petition we consider him to be guilty as charged." *Id.* at 437.

231. David Margolick, *After 40 Years, a Postscript on Hiss: Russian Official Calls Him Innocent*, N. Y. TIMES, Oct. 29, 1992, at B14.

232. REED IRVINE, JOSEPH GOULDEN, & CLIFF KINCAID, *THE NEWS MANIPULATORS* 105-07 (1993).

Volkogonov's opinion was cited as definitive proof of Hiss's innocence of perjury says something of the credulity and continuing partisanship of the Fourth Estate.

Now even poor Remington has a sympathetic biographer. That biographer ends his work with what may be an apt quotation: "He [Remington] was the least fortunaté of men . . . the small sinner who paid capital penalties."²³³ The tactics of the government were reprehensible, and Remington's crime does seem almost trivial in retrospect. Improper conduct secured the first indictment, and then Remington was convicted of perjury for testimony given in the course of his defense against it.²³⁴ Ironically, Remington had once proclaimed that "My only defense is complete candor."²³⁵ His "embittered" first wife's summary: "He is not the villain that you paint him . . . he is merely a liar."²³⁶

XI. THE SORRY CASE OF THE PRESIDENT'S MEN

[W]henever a speaker, with a sweeping gesture, drew the attention of his audience of judges to the Capitol, he would recall that it was but a short distance from the Temple of Jupiter to the Tarpeian Rock and that even the savior of the fatherland was not above the law. ²³⁷

One of our themes seems to be that fame and fortune have a way of slipping away. A position next to the flagpole is no certain protection. It is sometimes a liability—when the indictments begin to drop like mortar rounds. No man is above the law. The introductory quotation is an allusion to Livy's cautionary tale of the Roman Manlius, who won honor fighting a night battle against the Gauls at the Tarpeian Rock, only to meet his death later on the same site, executed as a criminal.²³⁸ Perhaps Mr. Hiss was able to take some small satisfaction from the fact that just as he was thrust down the Rock, so too, in time, were Mr. Nixon and lots of his men. Ironically, the soon to be disgraced President even made the

233. MAY, *supra* note 202, at 321.

234. Remington v. United States, 208 F.2d 567 (2d Cir. 1953) (Learned Hand, J., dissenting).

235. MAY, *supra* note 202, at 100.

236. *Id.* at 166.

237. FLORENCE DUPONT, DAILY LIFE IN ANCIENT ROME 171-72 (C. Woodall trans., 1992).

238. LIVY, ROME AND ITALY BOOKS VI-X OF THE HISTORY OF ROME FROM ITS FOUNDATION 37-96 (B. Radoce trans., 1982). Apparently Marcus Manlius used his fortune to relieve the suffering of debtors. He was charged by the Senate with plotting to become king, and he was executed in 384 B.C.. In the world of politics, no good deed goes unpunished. See also WILL DURANT, CAESAR AND CHRIST 23 (1971).

suggestion, on one of his famous tapes, that the Senate Watergate Committee use the Hiss probe as a model!²³⁹

Among the larger fish caught in the Watergate net were Former Attorney General John Mitchell, White House Chief of Staff H.R. Haldeman, and Domestic Council Chief John Ehrlichman, each convicted of conspiracy to obstruct justice; Mitchell and Haldeman were also convicted of perjury before a Senate Select Committee, and Mitchell and Ehrlichman were also convicted of perjury before a grand jury.²⁴⁰ Former Attorney General Kleindienst was "permitted" to plead guilty to a misdemeanor, on an information charging him with refusing to answer in the context of proceedings of the Senate Judiciary Committee.²⁴¹ Few shed any tears over the ruined careers. As we noted quite a few cases back, what goes around comes around.

In many ways, the sorriest case may have been that of Kleindienst. Supported in his rise to the position of "the country's top law enforcement officer" by Senator Barry Goldwater, Kleindienst had had a good relationship with his immediate supervisor, Attorney General Mitchell; and so he was able to further the careers of other young political and judicial stars. In 1968 he brought William Rehnquist (now Chief Justice of the United States Supreme Court) to Washington to be an Assistant Attorney General.²⁴² But in the minds of a good many of the now aging "Sixties" kids, not to mention their spectacularly ill-informed offspring, there could never have been any doubt of his malevolence. After all, as a Deputy Attorney General he was in charge of the roundup during the May Day demonstrations of 1971. He is quoted as having said at the time: "F--k the Constitution, we can worry about that later."²⁴³ On the other hand, some have said that he was the "hard luck guy" of Watergate; that he was run to ground for telling lies "when the truth would have done him credit."²⁴⁴ As usual, the truth lies somewhere in between the two extremes.

239. WEINSTEIN, *supra* note 185, at 554; see GEORGE HIGGINS, *THE FRIENDS OF RICHARD NIXON* v-xxi (1974) (containing the full stringer, including the small fry can). Largely forgotten is the acquittal of Kenneth Parkinson, a lawyer for the Committee to Re-Elect the President (CREEP), who was represented by the able and elegant trial lawyer Jacob Stein.

240. SAM ERVIN, *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 308 (1980) (holding up the full catch).

241. The charge was a violation of 2 U.S.C. §192 (1938). This statute was the Congressional weapon of choice during the interminable Iran-Contra investigations.

242. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS - INSIDE THE SUPREME COURT* 189 (1979).

243. HIGGINS, *supra* note 239, at 178. This is a declaration worthy of Attorney General Coke. However, in American history, actually doing this sort of thing to the Constitution has long been a Presidential prerogative. In support of a law that he wanted passed, Franklin Delano Roosevelt fired off an epistle to the House Ways and Means Committee: "I hope that your committee will not permit doubt as to Constitutionality, however reasonable, to block the suggested legislation." *Id.*

244. *Id.* at 250.

His prosecutors charged that:

In March and April of 1972 Kleindienst . . . repeatedly lied under oath in answering questions about the ITT affair put to him by the Senate Judiciary Committee during his own confirmation hearings. He went out of his way during the hearings to deny that any White House pressure had been brought on the Justice Department to drop its appeal of a pending ITT antitrust case. The truth was otherwise. In fact Kleindienst had been given direct orders, first by John Ehrlichman and then by President Nixon, that the Justice Department should drop the appeal in the Supreme Court, orders Kleindienst managed to avoid by threatening to resign.²⁴⁵

Nixon claimed that he based the order on his personal philosophy that corporations should not be attacked on the basis of their "bigness *per se*,"²⁴⁶ and not for any *quid pro quo*. And Kleindienst's threat worked. The appeal was not dropped. When his lies under oath came to light, his supporters his sentencing judge, and even his chief prosecutor²⁴⁷ made much of his "refusal" to follow the President's order, and the fact that he did not "personally gain" from the lies. Of course, he did get to be Attorney General. Would he have been confirmed if he had told the truth? Could he have served as Nixon's Attorney General if he had been confirmed after spilling the beans? Was he motivated solely by some misguided sense of loyalty, and the notion that the improper order was withdrawn—so the lie didn't count? The only thing we can be sure of is that the court, and the Arizona and D.C. lawyer disciplinary authorities gave him every benefit of the doubt, and then a slap on the wrist.²⁴⁸

After a couple of years most Americans probably forgot about the unfortunate Attorney General. He returned to the practice of law, and presumably life was relatively good until he got mixed up in an Arizona insurance scam.

245. RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* 377-78 (1977). Ben-Veniste and Frampton make the threat to resign rather than carry out an illegal order appear somewhat manipulative. When another Attorney General and his chief deputy resigned to avoid carrying out an order that they fire Watergate prosecutor Archibald Cox, they were declared heroes. *Id.* It is interesting how similar conduct can be given different "spins."

246. JUDITH BUNCHE, ET AL., *WATERGATE AND THE WHITE HOUSE* 36 (Edward W. Knappman & Evan Drossman eds., 1974).

247. *Id.* at 135. Jaworski "praised Kleindienst for defying a direct 'presidential order'" After this unexpected cheerleading, Jaworski told reporters that "in bringing charges against Kleindienst, there 'was no implication intended' that President Nixon had acted illegally by issuing [the order in the first place]!" *Id.*

248. See *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (Ct. App. D.C. 1975).

Based on a tip, the Arizona Bar decided to look into his participation in the affair. During its investigation, Kleindienst gave a deposition detailing his involvement with the scam. The State Bar charged him with perjury in this and other depositions. Although a jury acquitted Kleindienst of criminal charges arising from the same conduct, that acquittal (under a standard of proof "beyond a reasonable doubt") did not prevent the State Bar from concluding on the basis of "clear and convincing evidence" that Kleindienst gave testimony in depositions that he knew or believed was untrue when he gave it.²⁴⁹ The State Bar suspended him for one year, over a strong dissent that called for his disbarment. The dissenter opined that the "mild, lenient treatment" that Kleindienst received in his earlier Arizona disciplinary case "seems not to have made any impression on respondent, for only two years after that censure, he became involved in the insurance scam with the result that he again failed to tell 'the truth, the whole truth and nothing but the truth' while under oath."²⁵⁰

The treatment that Kleindienst received is in contrast to that received by California Lieutenant Governor Ed Reinecke. Prosecutors charged that he too, had lied to a Senate panel reviewing Kleindienst's nomination. The inquiry had to do with efforts to bring the Republican Convention to San Diego with the financial backing of ITT, the negotiations allegedly going on while ITT was squared off against the Justice Department. The assumption was that ITT was paying up in exchange for some kind of deal or settlement of the antitrust case. Reinecke was running for Governor at the time. Although Watergate Special Prosecutor Leon Jaworski would publicly admit that his staff had not managed to uncover any evidence that ITT committed any crimes in connection with the ultimate settlement of its case,²⁵¹ and despite the deal given Kleindienst, the prosecution pressed on with three felony counts of perjury against Reinecke. On July 27, 1974 he was convicted on one count. The *Baltimore Sun* had this to say about the Kleindienst and Reinecke cases:

Reinecke was there [in the confirmation hearings] as an outsider of sorts. He had nothing to gain by lying. But Kleindienst was the subject of the hearings. His nomination to be promoted from Deputy Attorney General to Attorney General was under consideration. His lies were calculated to bring himself a reward. Even if that reward were not the top law enforcement job in the land, it would be silly to say his false testimony was only a misdemeanor while Reinecke's was felonious. Where's the fairness in that?²⁵²

249. *In re Kleindienst*, 644 P.2d 249 (Ariz. 1982).

250. *Id.* at 258.

251. This admission was made on May 30, 1974. See BUNCHE, *supra* note 246, at 135.

252. THE SUN (Baltimore), May 17, 1974, reprinted in BUNCHE, *supra* note 246, at 318.

In the end, Reinecke "won" on appeal. There had not been a proper quorum of the Committee at the time that his testimony was taken.²⁵³ In this technical sense, the prosecution had not made its case stick.

XII. "PHYSICIAN, HEAL THYSELF"

One cannot exaggerate the importance of medical records in litigation. Jurors tend to believe that which is written over that which is spoken.²⁵⁴ Furthermore, an attorney can embarrass and trap a physician witness not only by what his or her records contain, but also by what they do not contain—history that he may or may not have taken but did not note in the record, observations he may or may not have made but he did not log on the chart, possibilities that he considered and ruled out but he never even mentioned in the records. Time-saving forms can be a mixed blessing, because physicians are notorious for recording only positive findings, and leaving blanks where they should have recorded a negative finding. This may leave an opening for a cross-examining lawyer, for the lawyer can draw and argue inferences from the absence of a notation. Did the doctor or nurse really make the inquiry or observation, or perform the task? Sometimes the inferences and suggestions are false, but the physician is not in a position to refute them. If the maintenance of the physician's records is poor, the impression is given that the physician may be unprofessional in other contexts.²⁵⁵ These are ways in which a lawyer may exploit a physician, often quite unfairly. But what about a false entry in a medical record? What about a physician who cooks the books? "Whatever the physician does, whether he or she is a treating physician, and expert, or a malpractice defendant, he or she should never, never, never alter a medical record, no matter what his or her intent may be If additions need to be made, they should be made in an honest and up front fashion, and be clearly labeled as such."²⁵⁶ Here is a case that proves the point.

Jacqueline Ellis went to Louisville Dentist Larry Shapero for some dental work, and later sued complaining that the good doctor botched an extraction and other procedures, forcing her to undergo unnecessary root canals. Needless to say, one would not expect this little story of medical misadventure to capture the attention of the press; but it did. It did because Dr. Shapero over-egged the pudding. He contended by way of defense, that the complained of procedures had

253. *U.S. v. Reinecke*, 524 F.2d 435 (U.S. App. D.C. 1975).

254. *See Underwood, Logic, supra* note 30, at 194.

255. JACK HORSLEY, *TESTIFYING IN COURT: THE ADVANCED COURSE* 57-58 (1972).

256. Richard H. Underwood, *Medicine And The Law*, in *PROFESSIONAL AND PRACTICE DEVELOPMENT* 50 (Emery Wilson & L. Reed Polk eds., 1990); *see also* Anthony C. Casamassima, Comment, *Spoilation Of Evidence And Medical Malpractice*, 14 *PACE L. REV.* 235 (1994).

been necessitated by the patient's failure to show up for appointments, and other like conduct.

At trial, the doctor-defendant produced the patient's treatment record, which he swore was original and unaltered. It appeared to support his version of the case. For example, it contained the entry "Patient wants teeth out no matter what."

Alas, this chart was original in the creative sense, but was otherwise found unconvincing. Employees had already removed a copy of the original chart, which did not contain this entry. Close examination also showed that the defendant's version had an additional date penned in with ink that was sufficiently different to be tell-tale.²⁵⁷ The doc had doctored the chart. The case settled on the spot for the relatively small sum that could and should have been paid over before any suit was filed. But His Honor was not amused, and referred the matter to the Commonwealth Attorney.

At his criminal trial for perjury Dr. Shapero's lawyer fell back on the notion that his client had not really lied—he had told the *literal truth*.²⁵⁸ Specifically, the lawyer argued that when the doc testified that the record was an original, he was saying only that it was not a photo-copy, which it wasn't. Here were the questions and answers:

Q: [on Cross-examination]: 'You have there, and have introduced into evidence, what I am understanding you are claiming and testifying under oath is the original record of Jackie Ellis?'

A: 'Yes, sir.'

257. See Cary B. Willis, *Perjury Trial Witnesses Say Disputed Record of Dentist is Different*, *COURIER-JOURNAL* (Louisville, Ky.), Dec. 16, 1993, at 5B. If the doc had wanted to add a truthful note based on what he contended that the patient had said or done, he should have clearly labeled the addition as an addition, and dated it properly. Truthful additions are not improper. When he tried to create a misleading impression, the doc became his own worst enemy.

258. Andrew Wolfson, *Dentist to be Tried on Perjury Charge; Shapero Allegedly Altered Records in Malpractice Case*, *COURIER-JOURNAL* (Louisville, Ky.), Nov. 8, 1993, at 1A: "[W]hen he said his version of the chart was an 'original' Shapero was telling the truth, [lawyer Frank] Haddad contended, because the document wasn't a photocopy. Courts have held that a defendant cannot be convicted of perjury merely because his remarks were 'shrewdly calculated to evade,' Haddad noted." *Id.*; see discussion in Underwood, *Logic*, *supra* note 30, at 194-99; Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 *ARIZ. J. INT'L & COMP. L.* 215 (1993). A thorough discussion of the "defense of literal truth" can be found at Chapter 3 of my book (unpublished manuscript, on file with the author). BUNCHER, *supra* note 246, at 134. During the battle of Watergate, Texas lawyer Jake Jacobson was indicted for perjury during an investigation by prosecutors into the so-called "Milk Fund" scandal. The indictment was dismissed because the question asked by the prosecutor which elicited the supposedly perjured answer was poorly worded. Jacobson's answer was misleading but was also "literally true." *Id.*

Q: 'And you are telling this jury and you are testifying under oath that you have not altered and rewritten that record?'

A: 'Yes, sir.'²⁵⁹

The judge and jury weren't buying any baloney²⁶⁰ this time, and our *medico* was convicted of perjury.²⁶¹

XIII. THE FIFTY-FIRST WAY TO LEAVE YOUR LOVER

*"There must be fifty ways to leave your lover . . ."*²⁶²

In a more innocent age the murder of a spouse or lover, and the concealment and burial of the body, might have created a sensation. The infamous *Crippen* case comes to mind.²⁶³ These days the likes of Crippen are exiled to obscurity or "Masterpiece Theatre." Now it seems that if one (the killer or victim) is not already a celebrity, and is to make prime time, one must kill in large numbers, or dine on the remains, or both. For whatever reason, one of the most curious of contemporary murders in this author's neck of the woods passed in review with hardly a murmur from the national media, although it inspired newspaper reporter

259. Cary B. Willis, *Dentist Shapero Convicted of Perjury in Malpractice Trial*, COURIER-JOURNAL (Louisville, Ky.), Dec. 18, 1993, at 9A.

260. Cf. THE TWO BOYS AND THE BUTCHER (15th Century) reprinted in THE MEDICI AESOP (Adele Westbrook & Bernard McTigue eds., 1989):

Two boys went to buy meat at a butcher's shop. Seeing that the butcher was busy helping a customer, one of the boys grabbed a piece of beef and stuffed it down the shirt of the other. The butcher, having finished serving the customer, came over to where the boys were standing and immediately noticed that some beef was missing. He accused the boys of theft, but the one who had taken it said that he didn't have it, and the one who had it said that he hadn't taken it. The butcher understood their trickery and warned them: 'You may think that you can get away with this bit of double talk here, but the gods won't be deceived by sophistry.'

Id. The moral of the fable is: Sometimes lying and telling the literal truth can amount to the same thing.

261. Willis, *supra* note 259.

262. PAUL SIMON, *Fifty Ways to Leave Your Lover*, on THE CONCERT IN CENTRAL PARK (Warner Bros. Records Inc. 1975).

263. See FAMOUS TRIALS (John Mortimer ed., 1984) ("Hawley Harvey Crippen, 1910").

Bob Hill to write an excellent book which he released as I was "finishing up."²⁶⁴ I included this because the monster lied and was set free, for a time at least, until federal authorities nabbed him and charged him with committing perjury before a federal grand jury and with lying to federal officers during their investigations. This work notes elsewhere that perjury prosecutions are rare, especially prosecutions of a defendant after an acquittal.²⁶⁵ This is an exceptional case.

Melvin Ignatow and Brenda Sue Schaefer met on a blind date (there is a lesson here) in 1986, exactly two years before her disappearance. They were engaged on Valentine's Day of 1987. Ms. Schaefer was reported missing on September 25, 1988. Her car was found along the highway with a flat tire and a broken window. The radio of the car had been removed. The family offered rewards. Suspicion began to focus on Ignatow, in part because of suggestions from Ms. Schaefer's friends that she was fearful of him and had considered breaking-up with him. In a curious twist, Schaefer's boss apparently sent a letter threatening Ignatow with execution by a gang of Cubans²⁶⁶ (I am not making this up) if Ignatow did not fess up and tell the police the location of the body. Although he was on the right track, this effort only resulted in the boss being fined for terroristic threatening. But this state case prompted Assistant United States Attorney Scott Cox to invite Ignatow to present his side of the story before a federal grand jury. Ignatow was accommodating.²⁶⁷

Both Ignatow and a new girl friend, Mary Ann Shore-Inlow, had told the grand jury that they had not been involved in Ms. Schaefer's disappearance. But Ms. Shore-Inlow broke, and led police to Schaefer's body, which they had buried behind a house that Shore-Inlow had rented. Shore-Inlow had apparently participated in and filmed the abuse of the victim, and then assisted in concealing the body after Ignatow had done with the poor lady (with chloroform).²⁶⁸ Investigators induced Shore-Inlow to carry a "wire" in an effort to obtain

264. BOB HILL, *DOUBLE JEOPARDY: OBSESSION, MURDER AND JUSTICE DENIED* (1995).

265. Among the subjects discussed in Chapters 3 and 4 of my book (unpublished manuscript, on file with the author). See James Shellenberger, *Perjury Prosecutions After Acquittals: The Evils Of False Testimony Balanced Against The Sanctity Of Determinations Of Innocence*, 71 MARQ. L. REV. 703 (1988).

266. See Leslie Scanlon, *Ignatow Confesses to Killing Schaefer*, COURIER-JOURNAL (Louisville, Ky.), Oct. 3, 1992, at 1A; Mary O'Doherty, *Missing Woman's Boss Fined \$300 for Threatening Letter*, COURIER-JOURNAL (Louisville, Ky.), Aug. 10, 1989, at 1B; Clay Rice, *Schaefer's Boss is Charged in Threat Against her Fiance*, COURIER-JOURNAL (Louisville, Ky.), Mar. 26, 1989, at 1B.

267. See HILL, *supra* note 264, at 104. (I note that Frank Haddad, a superb Louisville defense attorney who represented Dentist Shapero (you can't win them all) was amazed at these goings on. I note this not in criticism of Ignatow's trial lawyer, Charlie Ricketts, (another professional acquaintance of mine whom I would be honored to call friend), but in recognition of Frank. Frank died in 1995; (and he is missed).

268. 'The killer would later have the nerve to tell a federal judge that his torture victim "died peacefully." *Id.* at 296.

incriminating admissions from Ignatow that they could use against him in his murder trial.²⁶⁹

Shore-Inlow pled guilty to tampering with physical evidence, and then testified against Ignatow. In spite of all this, Ignatow was acquitted of murder. He had been a good liar, and had also been a good actor—the demeanor thing.²⁷⁰ Shore-Inlow's demeanor was bad.

She was telling a terrible tale, but her words were rote, matter-of-fact, her body language indifferent; she continually slouched back a little in her chair, legs crossed; her head slightly cocked, resting against her right fist. She looked tough, hardened, mostly unaffected by what she was saying She evoked some sympathy, but what she needed to sell was credibility.²⁷¹

The shortage of scientific evidence meant that one could always argue the “possibility” that others did the crime, and Shore-Inlow, as chief accuser, was a candidate. In the end she was not believed. And *he* also had a good lawyer—who, incidentally, was not in on the lies, and who fought hard for his client's freedom.

Charlie Ricketts may have filed some “strange, time-consuming motions,” and may be the only lawyer in the country qualified to give “the O.J.” defense lawyers lessons in the release of “red herrings”—“this had been a trial with entire schools of blinking red fish.”²⁷² Given the length of time the victim had been in the ground and given the mechanism of death, there was no way of obtaining much physical evidence linking murderer and victim. So the defense could argue on the basis of evidence that was not found—the evidence that could not be seen, as in Alice in Wonderland.²⁷³ The personal jibes between the prosecution and

269. See UNDERWOOD & FORTUNE, *supra* note 87; see also HILL, *supra* note 264, at 163. Mr. Ricketts filed a motion to exclude this evidence on Sixth Amendment and “ethical grounds.” Regarding the latter argument, it has been suggested that a prosecutor may not cause contacts with a suspect the prosecutor knows is represented by a lawyer, without that lawyer's permission. Federal prosecutors have given this rule short shrift, as have Attorneys General Thornburg and Reno, and the issue has been “litigated” extensively. Ethics expert Monroe Freedman of Hofstra University testified for Charlie Ricketts. In the end, Ricketts used the tapes to his client's advantage! *Id.* at 240-41.

270. See, e.g., HILL, *supra* note 264, at 242. “[H]e was . . . so nicely dressed, looked so innocent.” *Id.* For a discussion of demeanor, and how juries are often wrong—and manipulated, see Underwood, *Truth Verifiers*, *supra* note 223, at 597.

271. HILL, *supra* note 264, at 216, 211. “[A juror], conservative by nature, was appalled: ‘She wasn't dressed properly. Maybe her posture, the way she presented herself on the stand in terms of length of skirt’” *Id.*

272. *Id.* at 235.

273. *Id.* at 196, 198.

defense may have been unnecessary and unseemly;²⁷⁴ but it's hard to argue with success. The fencing was "six of one and half dozen of another," and to this day no one seems to doubt Ricketts' good faith. In his closing argument, Ricketts gave the jurors *fifty-one grounds for reasonable doubt*.²⁷⁵ It was a litany of sloppy police work, possibilities, the absence of "smoking gun" physical evidence. Still, the "Not Guilty" verdict shocked just about everyone, including the trial judge. "The phrase 'Ignatow jury' became a pejorative, a brief description of indifference, stupidity, and injustice that became permanently etched in the Louisville lexicon."²⁷⁶

The double jeopardy defense would have barred subsequent prosecutions. Frustrated authorities explored the possibility of bringing charges against Ignatow for perjury, subornation of perjury, and obstruction of justice. An indictment was obtained in federal court in January of 1992, shortly after his acquittal—based on his gratuitous October 16, 1989 grand jury testimony.²⁷⁷ Ignatow pled not guilty to the charges, and the usual grumblings about double jeopardy issued. But he was not going to "walk" a second time. The public was going to find out that there are *fifty-one* ways to leave your lover. Shore-Inlow had been telling the truth all along.

Some carpet installers found some of the victim's jewelry—a diamond engagement ring she had been wearing before her disappearance—in a floor duct in Ignatow's former home—and several rolls of film.²⁷⁸ The film showed Ignatow in the act of torturing and sexually abusing Ms. Schaefer. Why do they keep this stuff around?²⁷⁹ Who knows. The important point to make is that the murderer and liar would have escaped *any* punishment had it not been for happenstance!²⁸⁰

Confronted with the tell-tale celluloid, Ignatow pled guilty to lying to a federal grand jury and to the FBI and in the process, to murdering Brenda Sue

274. *Id.* Louisville Circuit Judge Martin Johnstone knows how Judge Ito felt in the later "O.J." Simpson case. Sickened by the fights between the defense lawyer and the prosecutor, Johnstone told them at one point "We can spend the next six months trying the Ricketts v. Jasmin, Jasmin v. Ricketts cases. . . . And we're not going to do it." *Id.*

275. *Id.* at 238.

276. HILL, *supra* note 264, at 252.

277. *Id.* at 251; see also Deborah Yetter, *Federal Grand Jury Indicts on Perjury Charge*, COURIER-JOURNAL (Louisville Ky.), Jan. 9, 1992, at 1A (detailing the indictment).

278. Scanlon, *supra* note 266, at 1A; HILL, *supra* note 264, at 277-80.

279. Deborah Yetter, *U.S. Unveils Evidence Against Ignatow*, COURIER-JOURNAL (Louisville, Ky.), July 14, 1992, at 1B. Other newly discovered evidence included expert testimony deciphering scratched out entries in Ignatow's diary as well as neutron activation analysis of dirt on a shovel found in Ignatow's garage which showed that it was of the "same general type" as the dirt in the victim's burial pit. *Id.*

280. HILL, *supra* note 264, at 290 (Hill muses "What if Ronald and Judith Watkins had waited just two more weeks to buy their new carpeting?").

Schaefer,²⁸¹ and was sentenced to eight years in a federal pen. Later authorities were shocked that he might be released even sooner than they had thought (after five years), because nobody seemed to understand the new Federal Sentencing Guidelines.²⁸²

If there is more to the story it will not be told until he emerges, and is once more among us.²⁸³ The federal judge who sentenced Ignatow ruled that he could not profit from any publications or publicity regarding the case.²⁸⁴

Gubernatorial appointment later elevated Jasmin, the "Preacher for the Prosecution," to the bench.²⁸⁵ Charlie Ricketts attempted, unsuccessfully, to disqualify the new judge from hearing cases involving his clients.²⁸⁶ United States Attorney Scott Cox went into private practice.

XVI. THE CASE OF THE GLADIATOR'S WIFE, OR "SAY IT AIN'T SO, 'O.J.'"

"Relationships which one can see—and these are rare—cast a veil over the real ones"

Heinz Risse, *"The Judgment of God"*²⁸⁷

What I dislike is [defense counsel] trying to make us look like a bunch of racist, corrupt bad guys while he paints this picture of his client being some poor innocent who is framed for murder because he is black and sleeping with a white woman That is simply not true. Race has nothing to do with this case. Absolutely nothing. [Defense counsel] would like us to just forget about what happened . . .

281. Scanlon, *supra* note 266, at 1A.

282. HILL, *supra* note 264, at 304-05; Deborah Yetter, *Prisons Cut 2 Years Off Ignatow's Term; Prosecutor to Fight*, COURIER-JOURNAL (Louisville, Ky.), Apr. 30, 1993, at 1A.

283. HILL, *supra* note 264, at 300. Ignatow instructed that Charlie Ricketts' firm keep any records pertaining to the case, and that his second lawyer have no publication rights. Ricketts withdrew from the defense after Ignatow was indicted in the second, federal, case. *Id.*

284. Deborah Yetter, *Ignatow Can't Profit from Publicizing Crime*, COURIER-JOURNAL (Louisville, Ky.), Jan. 7, 1993, at 6A.

285. Cary B. Willis, *Jones Chooses Jasmin to be Circuit Judge*, COURIER-JOURNAL (Louisville, Ky.), Oct. 21, 1992, at 1A.

286. *Chief Justice Won't Remove Jasmin from Ricketts' Case*, COURIER-JOURNAL (Louisville, Ky.), May 10, 1995, at 3B.

287. Heinz Risse, *Das Gottesurteil*, in HEITERES UND ERNSTES (James Hepworth & Heinz Rahde eds., 1964).

[there] . . . , but somebody murdered [her] . . . and all the legal tricks in the world aren't going to change that."

*Pete Early*²⁸⁸

This particular complaint about the "race card" *was not* made in the course of the trial of "O.J." Simpson. It was made in the *McMillian* case,²⁸⁹ which involved racism, perjury, and prosecutorial misconduct. But as the reader presumably knows, the identical complaint—the identical words—*were* uttered over and over again during the most recent "Trial of the Century." Author Joseph Wambaugh protested bitterly that "race" had nothing to do with the case, and that the "race card" was being dealt "from the bottom of the deck."²⁹⁰ It was a distraction, a red herring, and a diversion. But even the logician De Morgan²⁹¹ might have felt that Mr. Wambaugh "protest[ed] too much."

True, there was a mountain of evidence pointing in the direction of "O.J.," the least of which was a rather compelling glove²⁹² (without regard to the blood),

288. CIRCUMSTANTIAL EVIDENCE 329 (1995).

289. This case is discussed in Chapter 6 of my book (unpublished manuscript, on file with the author). Of course, Angelenos have always loved a murder trial, with a little racial seasoning please. *See, e.g.,* *People v. Zammora*, 152 P.2d 180 (Cal. App. 1944). Sometimes called the "Sleepy Lagoon" murder case, in which 22 Mexican-American youths (some were members of the "38th Street Gang"—so what else is new) killed others following an affray at a party in 1942. The convictions were quickly reversed. The testimony was flaky, and there may have been some perjury. *See* Kevin Starr, *The Simpson Verdict; Scandal & Redemption*, L.A. TIMES, Oct. 8, 1995, at M1; *People v. Ynostroza*, 232 P.2d 913 (Cal. App. 1951). The police ultimately got one of the defendants for "unlawfully possessing flowering tops and leaves of Indian Hemp." The "Sleepy Lagoon" trial led to the so-called "zoot suit" riots. The litigation over the incident continues; *see also* *Bertha Aguilar v. Universal Studios, Inc.*, 219 Cal. Rptr. 891 (Cal. App. 1985) (A tort action brought by a woman who claimed that she was falsely portrayed in the motion picture "Zoot Suit." The author confesses that he missed this flick.).

290. Joseph Wambaugh, *Perspective on the Simpson Case: The Race Card*, L.A. TIMES, Aug. 24, 1995, at B9. In an unguarded moment (on prime time television) one of the defense counsel admitted as much, but he quickly recanted.

291. The allusion is to AUGUSTUS DE MORGAN, *FORMAL LOGIC; OR THE CALCULUS OF INFERENCE, NECESSARY AND PROBABLE* (1847). De Morgan had a few things to say about lawyers' logic.

292. *See* Starr, *supra* note 289. The evidence showed that approximately two hundred pair of the gloves in question had been sold in the U.S., and that Nicole Brown Simpson had purchased two pairs as gifts for "O.J." At least one of these rare gloves was found at the crime scene before detective Fuhrman ever arrived. There is also no dispute that there was at least one bloody shoeprint laid down by an expensive and rare pair of shoes of the type and size of a pair purchased earlier by "O.J." The possible planting of a second glove, if it took place, was characterized by some as an attempt to frame a guilty man.

shoe, and fiber evidence.²⁹³ Conventional bloodwork and DNA “clinched” the case. There was also the defendant’s video-taped freeway flight—an escadrille of police vehicles had pursued him in a bizarre low-speed chase, as crowds of cheering fans gathered along the roadway.

But the prosecutors fought from defensive positions almost from the start. Their presentation was drawn out unnecessarily. The prosecutors allowed the defense to bait them (and side-track them); and the defense worked the *possibilities*, left open by seemingly inept police work and the detritus of the Rodney King debacle. A once “model” police lab seemed to have fallen on hard times, and one of the investigating officers seemed to have a very dark side indeed. But the spectators were not exactly impressed by the defense. An indignant L.A. Times whined that:

In the face of an overwhelming case against their client, they keep flinging notes in the jurors’ eyes in the hope that the jurors finally will not see what is plainly before them. Colombian drug lords who can’t tell dark-haired Faye Resnick from blonde Nicole Brown Simpson? A vast police conspiracy against Simpson by the very department that pampered him for years? Sloppy police work, sloppy lab work? An arthritic Simpson? All notes.²⁹⁴

The “Times” had a point; it was a strategy of *argumentum ignorantium*. But the police and the prosecution had left numerous openings. In particular, the coroner’s office had done a poor job, and the time of death had been left (deliberately?) vague. The glove “didn’t fit.” Simpson’s experts demonstrated the

293. Note the significance of this non-blood evidence.

294. Neal Garber, *The Nation; The Culture Wars; How We Know What We Know: Logic Meets Illogic At Simpson Trial*, L.A. TIMES, Aug. 6, 1995, at Opinion 3. The same refrain was heard later after FBI Agent William Bodziak undermined a defense experts suggestion that there might be shoeprints from “another” assailant at the murder scene. See Arnella, Levenson & Co., *The O.J. Simpson Murder Trial Series*, L.A. TIMES, Sept. 16, 1995, at 17A: “The footprint of the second killer turns out to have been made in the concrete when it was originally poured. Earlier, we had the Columbian hit squad. And who can ever forget Rosa Lopez? There’s been one fanciful assertion after another.” *Id.* Many have questioned the thinking capacity of the average juror; see also Tony Perry, *Cancer Patient’s Bid For New Trial Cites Simpson Verdicts; Courts: Lawyer charges that jurors in civil suit, which has much lower burden of proof, were wrongly influenced by standard applied in murder case*, L.A. TIMES, Nov. 1, 1995, at A3. Shortly after the Simpson verdict came in, a cancer patient and unsuccessful tort plaintiff who had sued his employer for exposing him to alleged nuclear risks at San Diego’s San Onofre nuclear power plant moved for a new trial. He argued that his jurors had watched the Simpson case and had made comments suggesting that they had imported an impossible to meet “beyond-a-reasonable-doubt” test into his civil case, in which the standard of proof should have been more likely than not. *Id.*

arts of diversion and exploitation of "possibilities,"²⁹⁵ slipping punches and counterpunching, and spinning off on speculative tangents without testing anything themselves, and without committing their employer to anything inconvenient or definite—although the famous Dr. Henry Lee did concede the reliability of DNA testing. The defense cried out about "*Brady* fouls"²⁹⁶ while systematically violating the reciprocal discovery rules. Judicial control of the case left much to be desired, as counsel argued out motions for the camera that they should have submitted on paper or *in camera*.²⁹⁷

By August 30, 1995 the L.A. Chief of Police had thrown one of the investigating officers, Detective Mark Fuhrman, to the dogs—all on national television. This was the officer who had jumped the fence at the Simpson compound to do an emergency search without a warrant, and who found the notorious bloody (not to mention rare, expensive, and almost certainly purchased by "O.J.'s" wife as a gift for him) glove matching another found at the crime scene. Prosecutorial *angst* came to a head because of a seemingly blustering and ineffective cross-examination of Fuhrman by F. Lee Bailey. Commentators had criticized Bailey for all of the usual reasons. The witness had not melted down on the stand. Bailey had promised much, and the TV mentality is geared up for the dramatic—for the deaths of Ananias and Saphira, struck down by the hand of God,²⁹⁸ on cue no less. But Bailey had been satisfied, because on being confronted with incidents of past "racist" behavior the feckless Detective Fuhrman denied ever having used the "N-word" in the immediately preceding ten years. Anyone, except perhaps Mother Theresa, would have found his statements to be incredible; and this reckless and self-destructive exaggeration *cried out* for the playing of the "race card." The witness had lied under oath. Then the *tapes* hit the news.

It seems that Fuhrman had been collaborating with a college professor and self-styled "screen-writer" in the development of a script about the "down-and-dirty" of police work in the "Naked City."²⁹⁹ The screen-writer's interview tapes of "consultant" Fuhrman recounted his abuse of African-American suspects, and alluded to instances in which officers manufactured evidence. The "N-word" was used liberally along with the "F-word," the latter being used as a sort of paramilitary punctuation. The tapes were "disgusting" enough to cause the "withdrawal" of Fuhrman's personal and vociferous lawyer, who had not been

295. See Underwood, *X-Spurt Witnesses*, *supra* note 67.

296. Violations of the prosecution's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

297. The case seems to prove the point that cameras do not belong in the courtroom after all.

298. See *Acts* 5:1-10.

299. One of the prosecutors alluded threateningly to alleged "love letters" from the witness to Fuhrman, but nothing like that ever got into evidence. Perhaps we will hear about these alleged letters in a Fuhrman perjury trial.

particularly squeamish up to that point, and who had already filed a libel suit against one of the defense counsel.

The prosecution was on the defensive yet again, propounding plausible reasons why Fuhrman *could not* have planted evidence; and considerably less convincing reasons why Fuhrman *would not* have planted evidence. The “*could not* haves” were set forth systematically, and rather persuasively, in an L.A. Times piece of August 31, 1995. The police had recovered the glove bearing Simpson’s genetic markers before “O.J.” returned from his Chicago alibi trip and gave the police a blood sample (which the defense suggested had been poured on the glove). The glove also bore carpet fibers from Simpson’s Ford “Bronco.” Other officers at the crime scene, most of whom barely knew Fuhrman, argued, and had testified, that he had had no opportunity to retrieve, manipulate, or plant evidence, and a conspiracy would have involved a great number of people. Still, these protestations were hardly conclusive, and the defense made what it could of possible opportunities for “planting.”³⁰⁰ Among the arguments advanced by the prosecution for the proposition that Fuhrman “*would not* have” planted evidence was the fact that “California law provides that any person who commits perjury in a capital case, causing the defendant to be executed, can himself be sentenced to death.” I have been unable to locate any California statute that says this, but the papers wouldn’t lie. In any event, assuming that such a statute exists, it would be the California equivalent of *Deuteronomy* 19:16-19. At the time the police collected the evidence this might have turned out to be a capital case. Furthermore, Simpson might have had an alibi for all that Fuhrman knew at the time. But a similar law did not deter the Elders from framing Susanna. More to the point, the Los Angeles Times of September 1, 2 and 3 carried stories that the L.A. Police Department had suspended two L.A. police officers for planting evidence and committing perjury in a murder case.³⁰¹ These officers had apparently interrogated their suspects using a paper bearing the signatures of witnesses, but they had forged the signatures. Later, at a preliminary hearing, one of the officers lied and said the signatures were real. Defense counsel got suspicious and demanded the original, which turned out to have been conveniently destroyed. Counsel submitted the copy to a document examiner, and the scheme unraveled.³⁰² The prosecution dropped the murder case so there was no need for the proverbial eye for an eye.

300. A strong pro-conspiracy piece was penned by Charles Linder, a former president of the L.A. County Criminal Bar Association in Charles Linder, *The Simpson Trial; When You Can’t See the Forest for the Leaf*, L.A. TIMES, Sept. 3, 1995, at M1.

301. Alan Abrahamson & Jodi Wilgoren, *Two LAPD Officers Suspended for Falsifying Evidence*, L.A. TIMES, Sept. 2, 1995, at A1; Ralph Frammolino, *Botched Forgery Led to LAPD Officers’ Suspensions; Police; Public Defender says Hunch Led to Discovery of Fake Signature*, L.A. TIMES, Sept. 3, 1995, at A1; see also Larry King Live (CNN television broadcast, Sept. 2, 1995).

302. Abrahamson & Wilgoren, *supra* note 301.

While the *Simpson* trial judge severely limited the "impeachment"—*after playing the tapes on TV* for all the world except the jury to hear—the defense renewed its previously denied suppression motions and frantically gathered its witnesses and worked the TV audience. The commentators droned on about jury instructions on the credibility of witnesses, and what may or may not be a "reasonable hypothesis of innocence." On September 6, 1995 Fuhrman took the stand with no jury present. Knowing that the witness would invoke the Fifth Amendment to any question that would be put, the defense asked him whether he had perjured himself at the preliminary hearing (motion to suppress), whether he had ever falsified a police report, and whether he had planted evidence in this very case. It was a ceremony marking the beginning of the end of the case. The demonstrators began lining up, the politicians, too, lined up to express their newly acquired outrage, police organizations took out ads condemning Fuhrman, and the Justice Department launched an inquiry. Comedian Mark Russel quipped that the question everyone was asking was whether "O.J." had planted evidence in the Mark Fuhrman case.³⁰³ On October 3, 1995 the jury returned a verdict of not guilty; but some of the many who felt that "O.J." was, in fact, guilty to a moral certainty suspected that there was still at least one proverbial "fat lady" out there, just waiting to sing.

A Postscript

I expect that the reader will have found this to be an odd collection of cases. I must admit that I followed no system when I selected them. I thought these particular cases were interesting, and hoped that the stories behind them might be entertaining. But in addition to entertaining the reader, I think that the cases illustrate a few worthwhile, if rather obvious, points.

Let's begin with the motive of the perjured witness. It is understandable that men and women will lie to protect themselves or others. Lies will be told to protect secrets, and to protect reputations, although attempts to "cover-up" the truth can be spectacularly self-defeating. It is also well understood that lies will be told to exact revenge, to achieve a political end, or to secure advancement, money or property. The surprising thing is that so little need be at stake. The politics may be petty. The amount of money or property to be won or lost may be trifling. The stake is often "merely" emotional. Love, injured pride, and jealousy (perhaps the most interesting of the emotions) will often do.

But motives may be less obvious, and the liar may be quite irrational.³⁰⁴ We may never understand why a lie was told. One cannot assume that someone is

303. See *Larry King Live* (CNN television broadcast, Sept. 16, 1995).

304. See DAVID FISHER, *HARD EVIDENCE* 56-57 (1995). Fisher describes one of the more bizarre cases of lying which occurred in the 1987 Tawana Brawley case, in which Ms. Brawley claimed that she had been abducted and raped by white cops who left her

telling the truth simply because no motive for lying is apparent. Indeed, this assumption is most readily embraced by one who wants something to be true, or at least wants others to accept something as true—that is, by one who is not really interested in the truth for its own sake. Let us consider the punishment of the perjured witness. Obviously, the principle justification for laws against perjury and the subornation of perjury is the hope that we may secure the integrity of the truth-finding process. We want to promote truth-telling and deter lying. In this regard, the multiplication of laws directed at professionals are probably effective—to some extent at least. Laws directed at the laymen are almost certainly much less so.

But how often are actual perjury prosecutions directed to this end? One gets the impression that, more often, the law has been invoked for revenge, or for the purpose of realizing some political end (the very base reason that lies are sometimes told!), or for the purpose of nabbing a criminal who might otherwise be difficult to nab, or, dare I say it, for the purpose of gaining some tactical advantage. Proving that perjury was committed, or that a “false statement” or a “false claim” was made, may be an easier, or a more palatable, brief for the prosecution.

Finally, in the short run, perjurers often “win.” Liars are hard to detect, run to ground, and punish. Discovery often comes by happenstance. As a consequence, perjurers do great harm, and do it more often than we are willing to admit. “Truth is the daughter, not of authority, but [of] time”³⁰⁵—that is, unless the authorities, and the public, lose interest in getting at the truth.



partially clothed, smeared with feces, and with racial slurs written on her body and clothing. Forensic evidence showed convincingly that the whole thing was staged. *Id.*

305. WILLIAM BROAD & NICHOLAS WADE, *BETRAYERS OF THE TRUTH: FRAUD AND DECIET IN THE HALLS OF SCIENCE* 224 (1982) (quoting Francis Bacon).